# REVIEW OF PROTECTIONS FOR VULNERABLE WITNESSES IN THE INVESTIGATION AND PROSECUTION OF SEXUAL OFFENCES

# Contents

# FOREWORD

In August 2018, the Minister for Justice and Equality appointed this Working Group, with representatives from key criminal justice agencies, to review and report upon the protections available for vulnerable witnesses in the investigation and prosecution of sexual offences. The Working Group was appointed in the wake of a high-profile trial which had taken place in the Crown Court in Belfast earlier that year. At the conclusion of that 42-day trial, two of the accused who were charged with rape were acquitted, as were two others who had been charged with lesser offences. That trial and its outcome undoubtedly focused attention on the conduct of rape trials and the experiences of complainants on both sides of the border. However, it must be said at the outset that if a similar trial had taken place in this jurisdiction, it would not have been open to the public (apart from bona fide representatives of the press) and the identities of the accused persons would not have been revealed unless they were convicted. Here, as in Northern Ireland, a complainant is always entitled to anonymity, irrespective of the ultimate verdict. But with the legal protections we have in place, it is most improbable that a complainant's identity would become known by informal means, as was alleged to have happened during the Northern Ireland trial. As will be clear from this report, we recommend that in this jurisdiction the laws providing for the exclusion of the public from sexual offence trials should be retained and that accused persons as well as complainants should remain entitled to anonymity.

However, the establishment of this Working Group provided a valuable opportunity to review the treatment of vulnerable witnesses in the investigation and prosecution of sexual offences. As noted in Chapter 1, we interpreted the term "vulnerable witness" quite broadly so as to include not only those witnesses (including defendants) who are vulnerable by virtue of age or disability but also those who may be vulnerable because of the nature of the alleged offence and their overall circumstances. This we believe to have been in keeping with the spirit of our Terms of Reference.

The substantive law on sexual offences is now quite modern and comprehensive, especially with the enactment of the Criminal Law (Sexual Offences) Act 2017, but many of the key procedural provisions, such as those relating to anonymity, date back to the 1980s and 1990s. A general review of those provisions was therefore timely. Many other important issues, including the use of intermediaries, the provision of training for legal personnel dealing professionally with victims of sexual offences, reducing delay in the trial process and the formal introduction of preliminary hearings had not so far received any sustained attention or evaluation. Our recommendations on these and other matters will hopefully assist the Government and agencies responsible for the administration of justice to devise new strategies and accompanying implementation measures to improve the plight of vulnerable witnesses at all stages of the criminal process.

Several of the submissions we received urged that consideration be given to having separate legal representation for victims at sexual offence trials. Having discussed this matter at some length, it became clear to us that the needs of victims for legal advice may extend well

beyond the trial itself. Victims are often most in need of advice and information in the immediate aftermath of the offence and in the lead-up to the trial. Indeed, they may also need advice after a trial which results in a conviction, as there may be an appeal against conviction, sentence or both. We therefore recommend that victims be provided with legal advice from the outset and, indeed, after the trial where one takes place and results in a conviction. We are also conscious of the measures that have been put in place by the Director of Public Prosecutions to ensure that victims have an opportunity to familiarise themselves with the court setting before a trial takes place. We are not recommending that there be separate legal representation for victims throughout a trial, but we strongly support the retention of the existing law which allows for separate legal representation while an application is being made to a trial court to question a victim about other sexual experience under s. 3 of the Criminal Law (Rape) Act 1981 (as amended). In fact, we go further and recommend some improvements in this regard. One is that any defence application to engage in such questioning should ordinarily be made at a preliminary hearing, so that arrangements can be put in place to ensure that appropriately experienced counsel are briefed to represent the victim for this purpose. Another is that the counsel so appointed should continue to represent the victim while any such questioning, if permitted by the trial judge, is taking place. We believe that this package of measures, if implemented, will be of great benefit to victims, irrespective of whether a trial takes place and irrespective of its outcome.

Throughout our deliberations, we have had to be conscious of the constitutional rights of accused persons, especially their right to trial in due course of law. Victims, of course, also have constitutional and legal rights that must be vindicated and protected. Our overriding objective has been to identify areas in which the treatment of victims might be improved and their experience made less stressful without, at the same time, encroaching on the constitutionally protected rights of accused persons. Many of our recommendations can be implemented within the framework of existing legislation, and those legislative changes we do recommend should, for the most part, be non-contentious. Above all, we have been conscious of the need for measures to prevent repeat victimisation. As the EU Directive on Victims' Rights states: "Victims of crime should be protected from secondary and repeat victimisation, from intimidation and from retaliation, should receive appropriate support to facilitate their recovery and should be provided with sufficient access to justice."

For the purpose of preparing this report, we consulted widely with representatives of victim support groups, representatives of the legal professions and many others. I take this opportunity to thank all our consultees for having engaged so constructively and helpfully with us. We benefited greatly from all the wisdom and experience they willingly shared with us.

I would also like to thank very sincerely the members of the Working Group for their commitment and dedication to the task we were set. They patiently and conscientiously considered the many drafts of the various chapters that I prepared for their consideration. They put a tremendous effort into suggesting and formulating recommendations, and into refining the content of the report. Individually and collectively, they brought an enormous

amount of experience and expertise to the table, and that in turn enabled us to agree a set of recommendations which, if implemented, should greatly improve the experience of vulnerable witnesses, and of victims in particular, who find themselves involved in the criminal process as a result of the alleged commission of a sexual offence.

Finally, on my own behalf and that of the Working Group, I want to acknowledge the excellent support we received from officials in the Department of Justice and Equality. We would like to acknowledge in particular the assistance we received from Ciara Carberry, Jane Ann Duffy, Siobhan McCabe, Sarah Sheppard, Megan O'Dowd and Susanna Gillespie.

Tom O'Malley

July 2020

# MEMBERSHIP OF WORKING GROUP

Tom O'Malley, B.L., Senior Lecturer in Law, NUI Galway (Chairperson)

Ursula Fernee, Assistant Principal Probation Officer, Probation Service

Susan Hudson, Solicitor, Office of the Director of Public Prosecutions

Michael Lynch, Detective Inspector, An Garda Síochána

Tom Ward, Principal Officer, Courts Service.

At earlier meetings of the Group, An Garda Síochána was represented by Detective Chief Superintendent Declan Daly.

# EXECUTIVE SUMMARY

The establishment of this Working Group was prompted by a widely shared concern about the experiences of vulnerable witnesses in criminal proceedings for sexual offences. The Minister for Justice and Equality therefore requested the Group to examine certain key aspects of the criminal justice process in so far as it relates to vulnerable witnesses, and to identify ways in which the treatment of such witnesses might be improved. The Group consisted of representatives from the main agencies involved in the investigation, prosecution and trial of sexual offences: the Garda Síochána, the Director of Public Prosecutions, the Courts Service and the Probation Service. It was chaired by Tom O'Malley, a barrister and Senior Lecturer in Law at National University of Ireland Galway.

The Working Group's Terms of Reference are set out and explained in Chapter 1 of the Report.

Chapter 2 describes the constitutional framework within which the rules and practices relating to the investigation, prosecution and trial of criminal offences, including sexual offences, must operate. It also provides a summary of the many progressive statutory measures that have been introduced in recent years to assist victims of sexual crime, especially during trial. This Chapter makes four general recommendations which are additional to the more specific recommendations in later chapters. These relate to:

- Promoting public awareness of victims' rights legislation;
- Promoting education about the meaning and importance of consent;
- Inter-agency co-operation and exchange of information, especially in relation to services for victims;
- Consistency in service delivery.

The remaining chapters of the Report deal in more detail with certain specific aspects of the investigation, prosecution and trial of sexual offences. The following topics are addressed:

- Investigation and prosecution of sexual offences;
- Anonymity of victims and defendants, public access to sexual offence trials and media reporting;
- Preliminary hearings
- The trial of sexual offences
- Information for victims
- Use of intermediaries
- Reducing delay in the trial process
- Training.

Many of the Working Group's recommendations can be given effect without the need for any statutory change. This holds true, for example, of most of the recommendations regarding the use of intermediaries, training for persons who deal on a professional basis with victims of sexual crime, and the provision of information for victims. We do, however, recommend some statutory changes relating, for example, to the conferral of anonymity on persons

accused of sexual assault and the exclusion of the public from the trial of sexual assault offences.

The Group's recommendation for the formal introduction of preliminary hearings has been strongly supported by all consultees, and indeed it reflects recommendations made elsewhere for the introduction of such hearings in the context of other serious criminal offences.

Overall, the Working Group's recommendations are intended to improve the present system by ensuring, as far as possible, that victims of sexual crime have access to information and advice from the time at which the offence was committed, that they will be kept informed of the progress of investigation, that they will be facilitated in giving their best evidence if called as witnesses and that they will be treated with respect and dignity throughout the entire process. Several of the recommendations are intended to assist all vulnerable witnesses, whether they are victims of an offence or otherwise.

The recommendations made in in respect of each topic are set out at the end of the relevant chapter.

A complete set of recommendations is provided in Appendix 4.

# CHAPTER 1: TERMS OF REFERENCE

1.1 The Review Group was tasked to undertake a "review of protections for vulnerable witnesses in the investigation and prosecution of sexual offences."

1.2 The Review Group's Terms of Reference as published in September 2018 were as follows:

(1) To review the adequacy of the mechanisms available in law and practice relating to the protection of vulnerable witnesses during the investigation and prosecution of sexual offences, including in particular:

- access to specialist training for An Garda Síochána, members of the judiciary and legal professionals dealing with sexual offences;
  - practical supports for vulnerable witnesses through the reporting, investigation and trial processes;
- provision of additional legal supports to witnesses during the court processes;
  - measures in place to protect vulnerable witnesses during evidence, including the use of measures such as pre-recorded evidence or video-link;
  - the causes of delay in sexual offence trials, and the effect of delay upon vulnerable witnesses;
  - the use of preliminary trial hearings to determine evidential issues including conflicts of evidence and sexual experience evidence;
  - provision for restrictions on public attendance at, and media reporting on, trials of sexual offences, and;
- such other relevant issues that may arise during the course of the review process.

(2) The review group shall, in particular, have regard to the recommendations of the publication by the Rape Crisis Network Ireland entitled 'Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings.'

The review group shall make recommendations to the Minister for Justice and Equality no later than 31 December 2018 or at the earliest date thereafter. The Minister will be provided with an interim report after 3 months.

1.3 The Terms of Reference did not offer any definition or description of the expression "vulnerable witnesses". The Review Group therefore had to make a determination as to what is meant by "vulnerable witnesses" for the purpose of this review.

1.4 Although widely used in academic and other literature on the criminal process and the law of evidence, the term "vulnerable witnesses" does not have a settled meaning. At first impression, it would seem to refer to persons who are vulnerable by virtue of some personal characteristic such as youth or mental or physical disability. Undoubtedly such persons come within the category of vulnerable witnesses. However, it appeared to the Review Group that the category should not be so confined as there is nowadays a widespread view, and in the Group's opinion, a defensible one, that witnesses in criminal trials, especially sexual offence trials, may be vulnerable by virtue of the circumstances in which they find themselves, even if they are not inherently vulnerable by virtue of age or disability.

1.5 The Review Group found particularly useful for this purpose the provisions of section 10 of the Victims and Witnesses (Scotland) Act 2014 which was intended, among other things, to implement the European Union Directive on the Rights of Victims of Crime (Directive 2012/29/EU) to which Ireland has also given effect in the Criminal Justice (Victims of Crime) Act 2017. Section 10 of the Scottish Act provides (in part):

> "For the purpose of this Act, a person who is giving or is to give evidence at, or for the purposes of, a hearing in relevant criminal proceedings is a vulnerable witness if –
>
> (a) The person is under the age of 18 on the date of the commencement of the proceedings in which the hearing is being or is to be held,
>
> (b) There is a significant risk that the quality of the evidence to be given by the person will be diminished by reason of –
>
> (i) Mental disorder (within the meaning of section 328 of the Mental Health (Care and Treatment) (Scotland) Act 2003), or
> (ii) Fear or distress in connection with giving evidence at the hearing,
>
> (c) The offence is alleged to have been committed against the person in proceedings for [various sexual, trafficking, domestic violence and stalking offences which are listed] or
>
> (d) There is considered to be a significant risk of harm to the person by reason only of the fact that the person is giving evidence or is to give evidence in the proceedings."

1.6 In South Australia, the Statutes Amendment (Evidence and Procedure) Act 2008 (s.10) defines a vulnerable witness as:

- A witness under 16 years of age;
- A witness who suffers from a mental disability;
- A witness who is the alleged victim of the offence to which the proceedings relate

- where the offence is a serious offence against the person;
- in any other case – where, because of the circumstances of the witness or the circumstances of the case, the witness would, in the opinion of the court, be specially disadvantaged if not treated as a vulnerable witness.

A witness who

- has been subject to threats of violence or retribution in connection with the proceedings, or

  has reasonable grounds to fear violence or retribution in connection with the proceedings.

1.7 The Review Group is not required to propose a statutory definition of "vulnerable witness" but it has found the Scottish definition a useful basis for devising a working definition of a vulnerable witness. It has therefore proceeded on the basis that a vulnerable witness is a person called upon to give evidence in connection with a sexual offence who is (a) under 18 years of age or (b) a person the quality of whose evidence may be diminished by virtue of a mental disorder or a physical disability, or (c) a person who has a well-founded fear or is likely to experience distress in connection with the giving of evidence. A mental disorder, for this purpose, may be interpreted in accordance with the Criminal Justice Act 1993 (s. 5 as substituted by s. 4 of the Criminal Procedure Act 2010) as meaning "a mental illness, mental disability, dementia or any disease of the mind". Further, in keeping with the terms of the Criminal Justice (Victims of Crime) Act 2017, s. 15(2)(f), regard must also be had to the particular vulnerability of victims of terrorism, organised crime, human trafficking, gender-based violence and violence in a close relationship.

1.8 However, in light of the Group's Terms of Reference, a "vulnerable witness" is not to be equated with a "vulnerable complainant". Needless to say, the treatment of complainants during the investigation and trial of sexual offences is a particular concern of this Report. However, persons other than the complainant may also be required to testify at a sexual offence trial and some of them could also be vulnerable. For example, a child might be called as a witness at a trial for the alleged abuse of one of the child's siblings. Further, the defendant may also be a witness. Under the terms of the Criminal Justice (Evidence) Act 1924, an accused person is a competent witness for the defence at every stage of the proceedings, although he or she may not be called as a witness except upon his or her own application. A defendant who is vulnerable by virtue of youth, disability or some other factor should also be entitled to such facilities as will enable him or her to give the best evidence possible.

1.9 The Working Group was not tasked with reviewing the substantive criminal law on sexual offences, nor was it asked to undertake a comprehensive review of the rules of evidence and procedure applicable to this area of law. The Report therefore concentrates on the specific issues coming with the Group's Terms of Reference and on making recommendations, where appropriate, on those matters. However, the Terms of Reference were sufficiently broad to permit a review of most of the key stages of the criminal process from the reporting of an offence to the point at which

the trial, if there is one, concludes. We hope that our recommendations, if implemented, will help to make the experience of victims and other vulnerable witnesses less stressful and traumatic than it can sometimes be.

1.10 Finally, in this Report, the term "victim" is used for the sake of convenience to include a person who makes a complaint of having been the victim of a sexual offence or who is the complainant at a trial for such an offence.

# CHAPTER 2: INTRODUCTION

2.1 In recent years, there has been a growing awareness of the difficulties experienced by vulnerable witnesses, and by victims of sexual offences in particular, at various stages of the criminal process, from the initial reporting of the offence to the conclusion of the trial. Granted, victims are now better treated in the criminal justice system than they were in past. There is a greater understanding of the difficulties they experience, especially during criminal trials where they are called to testify as witnesses. It is being progressively acknowledged that the experience of victims at various stages of the criminal process, from the reporting of an offence to the point at which the process ends, can strongly influence others in deciding if they should come forward and make formal complaints in respect of offences that have been committed against them. Yet, it is also clear that more needs to be done to vindicate the rights and interests of victims within the criminal process. This is especially true of victims who are vulnerable on account of youth, disability or the nature and circumstances of the offence that has been committed against them. Many, perhaps most, victims of sexual crime fall into this category, a reality that was recognised by then Minister for Justice and Equality, Charlie Flanagan, T.D., when he appointed this Working Group to examine the treatment and experience of vulnerable witnesses in sexual offence cases, and to make recommendations for any improvements that appeared necessary. The Working Group's remit extended to the treatment of "vulnerable witnesses" a category that can, of course, include defendants as well as victims. This is acknowledged throughout the report. Most of our recommendations relate to improving services and facilities for victims but some, such as those relating to the use of intermediaries (Chapter 8), apply to defendants as well.

2.2 This introductory chapter aims to set the remainder of the Report in context by outlining, first, the constitutional values and principles underpinning the criminal justice process and with which the rules, practices and institutions that collectively make up that process must conform. Secondly, it describes some of the more significant developments in the law relating to sexual offences over the past few decades and, especially, in recent years. Another important development, namely, improved facilities within court buildings is also noted. Thirdly, it acknowledges that the highest courts in the country have unequivocally recognised the gravity of sexual crime and the harm it causes to victims. Finally, we make four general recommendations that are intended to complement the more specific recommendations in later chapters of the Report. In summary, we recommend that: (1) steps should be taken to increase public awareness of the terms of the Criminal Justice (Victims of Crime) Act 2017; (2) there should be a government-sponsored programme of public education on the meaning and importance of consent in the context of sexual relationships and sexual activity; (3) in order to promote a victim-centred approach to the provision of services, there should be greater inter-agency communication to ensure that all state agencies, voluntary organisations and non-governmental organisations dealing with vulnerable victims are fully aware of the services provided by others and (4) the facilities for victims and other vulnerable witnesses should be of a consistent standard throughout the country.

## FUNDAMENTAL LEGAL VALUES

2.3 The rules, principles, procedures and institutions that collectively constitute the criminal justice process must conform with certain fundamental constitutional and human rights norms. The treatment of both victims and defendants must be guided by these norms. The right of every accused person to a trial in due course of law is guaranteed by Article 38.1 of the Constitution of Ireland which states:

> "No person shall be tried on any criminal charge save in due course of law."

Article 6 of the European Convention on Human Rights likewise states:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

The same Article then proceeds to list a number of more specific rights to which everyone charged with a criminal offence is entitled. These include the right to be presumed innocent until proven guilty, the right to be informed promptly and in detail of the nature of the charge, the right to adequate time for preparation of a defence, the right to legal representation (with free legal aid where necessary), the right to confront adverse witnesses and the right to an interpreter where necessary.

2.4 The concept of a trial in due course of law as protected by the Constitution is a compendious and evolving one. As Barrington J. said in *Re National Irish Bank*[1] the phrase "trial in due course of law" embodies "dynamic constitutional concepts into which lawyers have obtained deeper insights as society has evolved." It is now accepted, for example, that in evaluating the fairness of a trial, regard must be had to earlier stages of the proceedings and, in particular, to the manner in which evidence was obtained or gathered. Thus, in *People (DPP) v Gormley and White*[2] the Supreme Court held that the right to trial in due course of law entailed a right to procedural fairness from the time of arrest. Specifically in that case, it was held that an arrested person who requests a consultation with a solicitor should not, ordinarily at least, be questioned until such a consultation has taken place.

2.5 The criminal justice process is also, of course, intended to advance other important goals, most notably the detection, prosecution and punishment of crime. A key characteristic of a crime, as opposed to a private wrong such as a tort, is that it amounts to a wrong against the community as well as against a victim (where there is an identifiable victim). The State is therefore obliged to have effective measures in place for the investigation and prosecution of suspected crime, and for the punishment of those who are convicted. Where a conflict arises between the individual right to a fair trial and the broader community right to have alleged

1 [1999] 1 I.L.R.M. 321 at 353
2 [2014] 2 I.R. 591.

criminal offences effectively prosecuted, the individual right must prevail. As Denham J. said in *B v DPP:*[3]

> "The community's right to have offences prosecuted is not absolute but is to be exercised constitutionally, with due process. If there is a real risk that the applicant would not receive a fair trial then, on the balance of those constitutional rights, the applicant's right would prevail."

2.6 Victims too have rights, under both the Constitution and the law. The guarantee in Article 38.1 of the Constitution applies solely to persons charged with criminal offences, but other provisions of the Constitution may be invoked to support the rights of victims. Article 40.3. provides, in part:

> "1º The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen,
>
> 2º The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name, and property rights of every citizen."

This is one provision of the Constitution where the word "citizen" may confidently be interpreted as meaning "person."

2.7 The State therefore has a constitutional obligation to protect and vindicate the personal rights of those living within its jurisdiction, especially the rights to life, person, good name and property. The rights protected by the Constitution are not limited to those expressly mentioned in it. It implicitly protects other rights which have been identified by the superior courts over the years. Most notably, for present purposes, the courts have recognised a constitutional right to bodily integrity.[4] This is a constitutional right enjoyed by everyone irrespective of age, gender, nationality or any other human characteristic. A sexual assault (a term we use here in the broad sense to include rape and other forms of sexual violence) amounts to a clear violation of the right to bodily integrity. The State's overarching obligation to protect and vindicate must entail, at a minimum, more specific duties to protect individuals from sexual violation in so far as that is possible, to have measures in place to assist those who have been victimised and to make every effort to bring the perpetrators to justice.

2.8 The constitutional right of individuals (including individual members of a family) who have been sexually victimised to legal protection was recognised by the Court of Criminal Appeal in *People (DPP) v J.T.*[5] where the essential question was whether one spouse (the wife in that case) could be a competent and compellable witness for the prosecution at the trial of the other spouse for the sexual abuse of their child. The

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3 [1997] 3 I.R. 140 at 196.
4 *Ryan v Attorney General* [1965] I.R. 294.
5 (1988) 3 Frewen 141 at 157.

Court answered this question in the affirmative. Delivering the judgment of the Court, Walsh J. said:

> "Article 41 of the Constitution recognises the family as the fundamental unit group of society and clearly establishes that the family as such unit has its own special rights. The Constitution however also makes it clear in its various provisions that every member of the family, as an individual, has his own personal rights also guaranteed by the Constitution. One of these is the guarantee contained in Article 40, section 3 of the Constitution wherein the State undertakes to vindicate the personal rights of the person, and to vindicate the rights of such persons in the case of any injustice done. On the assumption, which this Court is satisfied is correct, that the applicant committed the acts alleged against his daughter, it is beyond argument that she suffered a very grave injustice. The State, in the exercise of its judicial power, is bound by the Constitution to vindicate her right to have justice done within the sphere of operation of the judicial power of government."

2.9 We have concentrated here on the c*onstitutional* rights of victims and defendants, because these are the most fundamental. As noted later in this Chapter, victims also have an extensive range of other rights conferred by statute. The Criminal Evidence Act 1992 (as amended) and the Criminal Justice (Victims of Crime) Act 2017 are particularly important in this regard. It is also to be noted that the European Court of Human Rights has repeatedly held that rape and other crimes of sexual violence amount to a violation of the rights guaranteed by the European Convention on Human Rights, especially the right to be free from torture and inhuman and degrading treatment or punishment under Article 3 and the right to privacy under Article 8.[6] The Court has acknowledged the "essentially debasing character of rape"[7] and has said:

> "Sexual abuse is unquestionably an abhorrent type of wrongdoing, with debilitating effects on its victims. Children and other vulnerable individuals are entitled to State protection, in the form of effective deterrence, from such grave types of interference with essential aspects of their private lives."[8]

State parties to the Convention are obliged to have laws and systems in place to outlaw and effectively punish rape and other serious sexual offences.[9] In *X and Y v The Netherlands*[10] the Court held that the respondent state's failure to enact legislation criminalising sexual advances to a mentally disabled adolescent represented a failure to fulfil a positive obligation to protect the victim's rights under article 8 of the Convention (which guarantees a right to personal and family privacy). As discussed further in Chapter 3 below, states are under a positive obligation to ensure that

6 See generally, Thomas O'Malley, *Sexual Offences,* 2nd ed (Dublin: Round Hall, 2013), Chap. 2.
7 *Aydin v Turkey* (1998) 25 E.H.R.R. 251, para. 189
8 *Stubbings v United Kingdom (1997)* 23 E.H.R.R. 213, para. 62.
9 *MC v Bulgaria* (2005) 40 E.H.R.R. 20.
10 (1986) 8 E.H.R.R. 235.

alleged sexual offences of a serious nature are effectively investigated so as to ensure, as far as possible, that the perpetrators are brought to justice.

2.10 In making recommendations for improvements in the treatment of vulnerable witnesses and in the services available to them, the Working Group has been guided by the fundamental constitutional and human rights imperatives just outlined. Where the defendant is a vulnerable witness, his or her right to trial in due course of law may require the adoption of special measures to ensure that he or she is not disadvantaged by virtue of whatever factor(s) are contributing to the vulnerability. Likewise, full and meaningful vindication of the victim's constitutional and legal rights may require special measures and arrangements of various kinds. Indeed, the same holds true of any person called to testify at a sexual offence trial who is vulnerable for one reason or another. In considering improvements that might be made to the current law and practice, and in formulating our recommendations, we made every effort to avoid conflict between the rights of accused persons on the one hand, and those of victims on the other. Our objective has been to recommend improvements, especially for vulnerable victims, that do not encroach on the constitutional rights of the defence. We acknowledge that in every criminal trial the presiding judge has an obligation to ensure that the accused person receives a fair trial and that every witness is treated fairly and respectfully. We believe that, with this vital safeguard, our recommendations, if implemented, would strike a fair balance between the rights of the accused and those of the victim and other witnesses.

## SIGNIFICANT DEVELOPMENTS TO DATE

2.11 Throughout this report, we make several recommendations for improvement in the treatment of vulnerable witnesses and the services available to them. However, it is important to record at the outset that a good deal of progress has already been made in this regard. This progress is reflected in a series of statutory measures beginning, for present purposes, with the Criminal Law (Rape) Act 1981, though most are of more recent vintage. Considerable progress has also been made in providing appropriate facilities for victims, during both the investigatory and trial phases of the criminal process. Special interview suites established by An Garda Síochána in various locations throughout the country (as described in Chapter 3 of this Report) and the facilities available in newly constructed court buildings are proving to be tremendously beneficial for victims of sexual crime. We accept, of course, that more needs to be done in this regard, and one of the recurring themes in our recommendations is that the nature and quality of services and facilities for victims should be as uniform as possible throughout the country.

2.12 What follows is a brief summary of some of the more significant developments, statutory and otherwise, that are relevant in the present context.

## Modernisation of the substantive law on sexual offences

2.13 Irish law on sexual offences has undergone significant development in recent years. This holds true of both the substantive and procedural law. With the entry into force of the Criminal Law (Sexual Offences) Act 2017, Ireland can now claim to have a reasonably comprehensive code of sexual offences, although they are not as yet in codified form. Offences such as rape, sexual assault, incest and sexual acts with persons under the prescribed age of consent have long been part of our law. These have more recently been supplemented, especially under the 2017 Act, with a range of other offences mostly intended to outlaw the sexual exploitation of children, including exploitation through the use of electronic and social media. The 2017 Act also modernised the law relating to so-called defilement offences (involving certain sexual acts with persons under the age of consent) and offences against persons with intellectual disabilities.

## Reform of criminal procedure and criminal evidence

2.14 The relevant procedural law has also undergone a great deal of reform, especially since the early 1990s. Both the Criminal Law (Rape) Act 1981 and the Criminal Law (Rape) (Amendment) Act 1990 included important measures relating to evidence and procedure. For example, the 1981 Act placed restrictions on the questioning of victims about sexual experience other than that to which the case related, and 1990 Act abolished the mandatory corroboration warning in sexual offence trials, replacing it with a discretionary warning. The Criminal Evidence Act 1992, which has undergone significant amendment since its enactment, includes several provisions designed to assist vulnerable witnesses.[11] It also allows for the evidence of a person under the age of 14 years to be received otherwise than on oath or affirmation where the court is satisfied that he or she is capable of giving an intelligible account of relevant events, and deals with the competence and compellability of spouses and former spouses as prosecution witnesses. More recently, the Criminal Justice (Victims of Crime) Act 2017 confers a wide range of rights on victims of crime. Its main provisions are outlined later in this Chapter.

## Consolidation and review of the law

2.15 As already noted, the present law, while reasonably comprehensive, is dispersed over many statutes dating mainly from the early 1980s. It would be of immense value to everyone working in the field, and especially to those professionals engaged in the prosecution and trial of sexual offences, if this law were now codified in a single statute. We are aware that the Law Reform Commission is working on such an exercise as part of its Fifth Programme of Law Reform and we greatly welcome that initiative.

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11 A revised version of the Criminal Evidence Act 1992 incorporating amendments up to 1 January 2019 has been produced by the Law Reform Commission: www.lawreform.ie

## Safety of victims to be considered at bail applications

2.16 Under s. 9A of the Bail Act 1997 (inserted by the Criminal Justice Act 2017, s. 8), a court considering an application for bail may, on the application of a member of the Garda Síochána, hear evidence from the victim as to (a) the likelihood of direct or indirect interference or attempted interference by the accused person with the victim or a member of the victim's family, and (b) the nature and seriousness of any danger to any person that may be presented by the release of the accused person on bail.

## Right to anonymity

2.17 Once a person is charged with a sexual assault offence, the victim may not be publicly identified, except in the very limited circumstances set out in s. 7 of the Criminal Law (Rape) Act 1981.[12] This right to anonymity continues to apply, irrespective of the outcome of a trial. A person charged with a rape offence is also entitled to anonymity unless convicted of the offence. The relevant law is described in Chapter 4 of this Report.

## Exclusion of the public from court during sexual offence trials

2.18 In any proceedings for certain sexual offences including rape, aggravated sexual assault and incest, there shall be excluded from the court all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the press, and such other persons as the judge may in his or her discretion permit to remain. The relevant law is also described in Chapter 4 of this Report.

## Victim impact evidence at sentencing

2.19 The introduction of victim impact statements under the Criminal Justice Act 1993 was a significant landmark in the recognition of victims' rights. It guaranteed victims a voice at the sentencing hearing. Prior to that, victims had no opportunity, formally at least, during the trial process, to give expression to the impact which the offence had on them. In its present form, s. 5 of the 1993 Act[13] provides that when imposing sentence for a sexual offence (or for certain other offences), a court must take account of the impact of the offence on the victim and may receive evidence or submissions in that regard. A court shall hear evidence from the victim about the impact of the offence, if the victim wishes to give such evidence. Section 5 of the 1993 has further been amended by the Criminal Justice (Victims of Crime) Act 2017 (s. 31) to provide that it applies "where a natural person in respect of whom an offence has been

12 As amended by the Criminal Law (Rape) (Amendment) Act 1990, s. 17.
13 As substituted by the Criminal Procedure Act 2010, s. 4.

committed, has suffered harm, including physical, mental or emotional harm, or economic loss, which was directly caused by that offence."

## Review of unduly lenient sentences

2.20 The Criminal Justice Act 1993 also provides for the review of unduly lenient sentences. More specifically, it allows the Director of Public Prosecutions to refer to the Court of Appeal a sentence which she regards as unduly lenient. The Court, if it is of the opinion that the challenged sentence is unduly lenient, may quash it and impose in its place such sentence as it considers appropriate. This provision applies to a sentence imposed for any offence following conviction on indictment. Its essential purpose is to ensure, as far as practicable, that sentences imposed for serious offences are appropriate and proportionate, having regard to the gravity of the particular offence and the personal circumstances of the offender. However, it is undoubtedly of value to victims as well, given the additional stress they may suffer if the sentence imposed on the offender does not seem to reflect adequately the gravity of the offending conduct. As a matter of general policy, undue leniency applications are meant to be used sparingly and an appeal court must be satisfied that the sentence was not only lenient but *unduly* lenient. The Director of Public Prosecutions refers a number of cases to the Court of Appeal each year. Approximately 50 cases were lodged with the Court in 2017 and again in 2018. Of those heard in 2017, 30 were successful and 18 were refused, while in 2018, 26 were successful and 10 were refused.

## Separate legal representation for victims during sexual offence trials

2.21 The Sex Offenders Act 2001 introduced several important measures regarding the supervision and control of convicted sex offenders. It provided for the imposition of notification requirements (often described as the sex offenders register), post-release probation supervision and sex offender orders. Most notably for present purposes, it also provided that where an application is made to a trial court under section 3 or 4 of the Criminal Law (Rape) Act 1981 (to question a victim about other sexual experience), the victim shall be entitled to be heard in connection with the application and to be legally represented for that purpose. Further, a victim is entitled at this point to legal aid under the Civil Legal Aid Act 1995 (as amended). In Chapter 6 of this Report recommendations are made for further improvements in this system.

## Admissibility of unsworn evidence of children

2.22 In many sexual offence trials, especially those involving the alleged sexual abuse of a child, the evidence of a child may be crucially important. There was a time when all evidence had to be given on oath and anyone who was not deemed to understand the spiritual and legal significance of the oath was prohibited from testifying. That law was gradually modernised over time, but one major development in this jurisdiction was the inclusion of a provision in the Criminal Evidence Act 1992 (s. 27) to the effect

that the evidence of a person under 14 years of age or a person with a mental handicap (in the language of the statute) may be received otherwise than on oath or affirmation if the court is satisfied that the person is capable of giving an intelligible account of the relevant events. The same Act (s. 28) abolished the mandatory corroboration requirement in respect of the unsworn evidence of a child.

## Special measures

2.23 The Criminal Evidence Act 1992, which has been amended extensively since its enactment, contains a range of valuable measures designed to assist vulnerable witnesses, especially in sexual offence trials[14]. These include:

- Where a person under the age of 18 years is giving evidence (other than through a live television link) in a sexual offence trial, the court may direct that a screen be positioned so as to prevent the witness from seeing the accused, unless the court is satisfied that such a direction would be contrary to the interests of justice. In fact, a court may issue such a direction when a victim of any offence is giving evidence, even if the victim is 18 years or older, if satisfied that the interests of justice so require.

- Where a person under 18 years or a person with a mental disorder is giving evidence at a sexual offence trial through a live television link, the court may direct that any questions put to the witness be put through an intermediary. The role of intermediaries is discussed in detail in Chapter 8 of this Report.

- As a result of an amendment made by the Criminal Justice (Victims of Crime) Act 2017, a court, when deciding if it should direct that any of the foregoing special measures should be put in place in respect of the victim, must have regard to the need to protect the victim from secondary and repeat victimisation, intimidation or retaliation, taking into account the nature and circumstances of the case and the personal circumstances of the victim.[15]

- Where a person under the age of 18 years gives evidence at a sexual offence trial, the court shall direct that the accused shall not personally examine the witness unless satisfied that the interests of justice require that the accused should conduct the cross-examination personally. The same applies where the victim is giving evidence, even if he or she has reached the age of 18 years.[16]

- A video recording of a statement made during an interview with the Gardaí by a person under the age of 18 years or a person with a mental disorder in connection with an alleged sexual offence (or certain other offences) is admissible at the trial as evidence of any fact stated therein, on condition that

14 For a comprehensive analysis of these measures and of relevant provisions of the Criminal Justice (Victims of Crime) Act 2017, see Alan Cusack, "Addressing vulnerability in Ireland's criminal justice system: A survey of recent statutory developments" (2020) International Journal of Evidence & Proof (forthcoming).

15 Criminal Evidence Act 1992, s. 14AA inserted by Criminal Justice (Victims of Crime) Act 2017, s. 30.

16 Criminal Evidence Act, 1992, s. 14C, inserted by Criminal Law (Sexual Offences) Act 2017, s. 36.

direct oral evidence by that person would be admissible. The person whose statement was recorded must be available for cross-examination at trial. The video recorded evidence will not be admitted if the court is of opinion that its admission would be contrary to the interests of justice.[17]

## Disclosure of counselling records

2.24 As discussed in some detail in Chapter 6 of this Report, it is essential for the purpose of a fair trial that the prosecution should disclose all relevant material within its possession or power of procurement to the defence unless there is a valid countervailing reason (such as some form of recognised privilege) for not doing so. The defence in sexual offence cases will often seek disclosure of the victim's counselling records. This can cause some degree of distress and anxiety to victims because the records in question may contain deeply personal and private information which is unrelated to the charge(s) being tried and which the victim, understandably, does not wish to have disclosed. To address this situation, the Criminal Law (Sexual Offences) Act 2017 has introduced a procedure whereby, unless there is voluntary disclosure, the accused must apply to the trial court for the disclosure of counselling records. The system is described in some detail in Chapter 6 of this report. However, the new procedure has the advantage that a victim may object to the disclosure of certain records and that the final decision on disclosure will be made by a judge who has heard from all the relevant parties and who has taken account of the specified statutory criteria.[18]

## Rights conferred by Criminal Justice (Victims of Crime) Act 2017

2.25 The Criminal Justice (Victims of Crime) Act 2017 gives effect to the European Union Victims' Rights Directive.[19] The most important characteristic of this legislation is that it confers *rights* on victims, irrespective of the nature of the crime. Those rights include, but are not limited to, the following:

- At the first point of contact with the Garda Síochána a victim is entitled to information on a wide range of matters, including procedures for making a complaint, the role of the victim in the criminal process, and the victim's entitlement to various services.[20]
- A victim has the right to be kept informed of the progress of the investigation and any criminal proceedings that follow.[21]
- A victim has a right to request a review of a decision not to prosecute.[22]

17 Criminal Evidence Act 1992, s. 16.
18 Criminal Evidence Act 1992, s. 19A, inserted by the Criminal Law (Sexual Offences) Act 2017, s. 39.
19 Directive 2012/29/EU of the European Parliament and of the Council of 25 October 2012 establishing minimum standards on the rights, support and protection of victims of crime, and replacing Council Framework Decision 2001/220/JHA.
20 Criminal Justice (Victims of Crime) Act 2017, s. 7.
21 Criminal Justice (Victims of Crime) Act 2017, s. 8.
22 Criminal Justice (Victims of Crime) Act 2017, s. 9.

- The Garda Síochána must, when investigating an offence, carry out an assessment of the victim in order to identify any protection needs of the victim, to ascertain whether and to what extent a victim might benefit from protection measures, and whether the victim, due to his or her special vulnerability to secondary victimisation, intimidation or retaliation, might benefit from special measures during the investigation and in any later criminal proceedings. The Act of 2017 sets out the nature of the special measures that may be provided for victims during both investigation and court proceedings. [23]
- A victim has a right to request information about any significant developments in the investigation of the alleged offence, about key prosecution decisions, (in the event of a conviction) about the date of sentencing and of any appeal arising from the conviction, and other matters.[24]
- A victim has a right to request information about any term of imprisonment imposed on the offender, about any temporary release for the offender and the conditions attaching such release, and any escape from custody by the offender. The same applies where the offender is sentenced to custody other than imprisonment.[25]
- A court has a general power to exclude the public, any portion of the public or a particular member of the public (except officers of the Court and *bona fide* representatives of the press) in any proceedings relating to a criminal offence if the court is satisfied that the nature or circumstances of the case are such that there is a need to protect a victim from secondary and repeat victimisation, intimidation or retaliation, and that it would not be contrary to the interests of justice to do so.[26]

## Consultation with victims prior to grant of early release to imprisoned offenders

2.26 The victim of a violent crime will naturally be concerned if she or he discovers that the perpetrator is being granted early release from prison or being considered for such release. Every prisoner serving a determinate prison sentence is entitled to one-quarter remission of the sentence, subject to good behaviour. In addition, a prisoner may qualify for temporary release, although there is no automatic entitlement to it. More recently, the Parole Act 2019 has introduced a formal system for release on parole of prisoners serving life sentences and long determinate sentences (of at least eight years). Any information system for victims of the kind recommended in Chapter 7 of this Report should include advice about these early release arrangements. As noted earlier, the Criminal Justice (Victims of Crime) Act 2017 entitles a victim to request to be kept informed of these matters. However, it is to be noted that the Parole Act 2019, which has yet to be brought into force, authorises the Parole Board, once established, to meet with and receive oral and written submissions from the relevant victim (meaning the victim of the offence in respect of which the prison

23 Criminal Justice (Victims of Crime) Act 2017, ss. 15 to 19.
24 Criminal Justice (Victims of Crime) Act 2017, s. 8(2).
25 Criminal Justice (Victims of Crime) Act 2017, s. 8(2).
26 Criminal Justice (Victims of Crime) Act 2017, s. 20.

sentence is being served) when deciding on the grant or revocation of parole.[27] Further the Board may assign a legal representative to the victim for this purpose. The Parole Board is also required to establish a scheme for granting legal aid to victims as well to parole applicants and parolees.[28]

Pending the commencement of the Parole Act 2019 and the setting up of the statutory Parole Board, the current system for communicating with victims in relation to matters relevant to the parole of prisoners is orchestrated through the mechanism of the Victim Liaison Office (VLO) in the Irish Prison Service. The VLO contacts victims when a prisoner is due to be reviewed by the interim Parole Board so that they can make a submission to the Board. Only submissions that the victim has agreed to be included in the prisoner's dossier are sent to the interim Parole Board. The interim Parole Board has an open policy in which all documents reviewed by the Board are seen by the prisoner. Only victim submissions received from victims registered with the VLO are accepted by the interim Parole Board. Any submissions sent directly to the interim Parole Board are not accepted but are sent to the VLO for verification and to contact the victim to obtain consent for the inclusion of the submission in the prisoner's dossier. The current interim Parole Board does not write to victims seeking submissions or give victims any updates on the outcome of reviews. This function is carried out by the VLO.

### Improvement in court facilities

2.27 There have been major improvements in the facilities available to victims, their relatives and supporters in some of the court buildings where criminal proceedings for sexual offences are held. This is especially true of the Criminal Courts of Justice in Dublin where the majority of trials for serious sexual offences are held. Some other newer court buildings throughout the country also have excellent facilities in this regard. However, as we recommend below, it is important to ensure that there is consistency in the standard of facilities and services for victims and other vulnerable witnesses in sexual offence cases wherever criminal proceedings take place.

## JUDICIAL RECOGNITION OF THE GRAVITY OF SEXUAL CRIME

2.28 The gravity of rape and other forms of sexual violence has been recognised by the highest courts of this country, especially in recent years. They have stressed that rape, in particular, amounts to a violation of the victim's constitutional and human right to bodily integrity and personal autonomy. As far back as 1988, in *People (DPP) v Tiernan*,[29] a leading authority on sentencing for rape, the Supreme Court said:

> "The crime of rape must always be viewed as one of the most serious offences in our criminal law even when committed without violence beyond that constituting

27 Parole Act 2019, s. 13.
28 Parole Act 2019, s. 14.
29 [1988] I.R. 250 at 253.

> the act itself…. The act of forcible rape not only causes bodily harm but is also inevitably followed by emotional, psychological and psychiatric damage to the victim which can often be of long term, and sometimes lifelong duration…. Rape is a gross attack upon the human dignity and the bodily integrity of a woman and a violation of her human and constitutional rights. As such it must always attract very severe legal sanctions."

More recently, in *People (DPP) v C.O'R*[30] the Supreme Court said:

> "The crime of rape is about the right of a woman to be protected against a gross violation of her mental and physical integrity. Those rights are protected by the Constitution as part of the collection of rights which the State guarantees to respect and, specifically by making rape an offence, to defend and vindicate as far as practicable. No one is entitled under our law to justify any deprivation of the constitutional rights of another person on the basis that they might have been consenting. For any accused person to take any such risk would be unjustifiable. To violate a woman on any such premise as she might be consenting to intercourse is outside the legal order as defined by the [Criminal Law (Rape) Act 1981]."

2.29 Later in the same judgment, the Supreme Court described rape as "a terrible violation of a woman's physical and mental integrity." In that case, the Court was concerned solely with the mental element of rape as defined by s. 2 of the Criminal Law (Rape) Act 1981. This explains its concentration on the gravity and impact of heterosexual rape. However, the Court's observations are equally applicable to other crimes of sexual violence, irrespective of the gender or age of the victim.

2.30 The courts have also stressed the importance of genuine consent and the communication of consent. As discussed further below, Irish statute law now defines consent as free and voluntary agreement to a sexual act.[31] Even before the enactment of this legislation, the Supreme Court had said, in the aforementioned *People (DPP) v C.O'R*,[32] that consent is "the active communication through words or physical gestures that the woman agrees with or actively seeks sexual intercourse." The courts have further stressed that on no account should the manner in which a person dresses or the acceptance of an invitation to somebody's residence be treated as signifying consent to a sexual act. As the Supreme Court said in *People (DPP) v F.E.*:[33]

> "Thus, it would be wrong to ever consider that kissing a man, wearing revealing clothing, taking a lift in a car, or accepting an invitation to a flat for refreshments are invitations to rape. They cannot be. The entitlement of a woman to refuse to consent to any or all sexual contact is absolute since her bodily and mental autonomy are fully protected by the definition of the offence or rape and kindred offences".

30 [2016] 3 I.R. 322, para. 53.
31 Paragraph 35 below.
32 [2016] 3 I.R. 322, para. 42.
33 [2019] IESC 85, para. 69.

Nor may such factors be treated as mitigating at sentencing, in the event of a conviction.[34]

## FOUR GENERAL RECOMMENDATIONS

2.31 In the remaining chapters of this report, we make specific recommendations in connection with those matters falling within our Terms of Reference. At this point, however, we wish to make four general recommendations which we believe to be important for the purpose of preventing sexual crime and delivering better services to vulnerable witnesses, especially in the course of criminal trials. Our main recommendation, as far as prevention is concerned, is that determined efforts should be made to educate members of the public about the necessity and meaning of consent in relation to sexual activity. We are not, of course, claiming that this is a panacea, or anything like it, for the serious and apparently growing problem of sexual crime. But we believe that it is one measure that may help to some degree in reducing the incidence of such crime.

## PROMOTING PUBLIC AWARENESS OF VICTIMS' RIGHTS LEGISLATION

2.32 As already noted, the Criminal Justice (Victims of Crime) Act 2017 confers a wide range of important rights on victims. The Act specifies, for example, the matters about which victims are entitled to be informed on their first point of contact with the Gardaí. It also entitles them, among other things, to be kept informed of the progress of an investigation and to request a review of a decision not to prosecute. It is clearly important that all victims should be aware of their statutory rights. However, the Working Group had reason to believe, on the basis of observations made by consultees and others, that many victims were probably not aware of those rights. The Group therefore recommends that the Department of Justice and Equality, perhaps in collaboration with relevant statutory and/or voluntary bodies, should take positive steps, by means of an ongoing awareness campaign, to bring the core provisions of the 2017 Act to public attention. The objective should be to ensure that anyone who becomes the victim of a crime is aware of their rights under this legislation. The need for such awareness is particularly acute in the case of sexual crime which is likely to leave victims severely traumatised. In many instances, the victim of sexual crime may be isolated and unable to reach out to others for support. This may happen, for example, where a person is sexually abused by another family member. It is all the more important therefore that such persons are aware of the rights which the law has conferred upon them, and especially of the information and assistance to which they are entitled when they first approach the Gardaí in connection with the offence.

34 *People (DPP) v Tiernan* [1988] I.R. 250 at 255.

2.33 The Working Group welcomes the recent publication of a new Victims Charter by the Government of Ireland in February 2020. The Charter, which has been allocated a dedicated website (www.victimscharter.ie), does not of itself confer legal rights, but it is a valuable statement and declaration of the rights and services to which victims are entitled. The Working Group recommends that the existence and the main provisions of the Charter should also be brought to public attention as part of any awareness campaign undertaken in connection with the Criminal Justice (Victims of Crime) Act 2017.

## EDUCATION ABOUT CONSENT

2.34 Absence of consent is a key definitional element of certain serious sexual offences, including rape and sexual assault. The conduct element of these offences may be legal or illegal depending on the presence or absence of consent. For example, an act of sexual intercourse between two consenting persons of full age and capacity is perfectly legal. Absence of consent on the part of one of the persons involved renders it a serious crime. Consent (or its absence) in these circumstances is morally transformative. It makes all the difference between an act that can be deeply fulfilling for both parties and one that amounts to a gross violation of the human rights of one of them. It is therefore vitally important that there should be a clear legal definition of consent and, further, that every member of society should be aware of the illegality of non-consensual sexual activity and of its harmful impact on a victim.

2.35 Ireland now has a statutory definition of consent, and this is greatly to be welcomed. Section 9 of the Criminal Law (Rape) (Amendment) Act 1990, inserted by s. 48 of the Criminal Law (Sexual Offences) Act 2017, provides:

> "A person consents to a sexual act if he or she freely and voluntarily agrees to engage in that act."

It then proceeds to list certain circumstances (and the list is not intended to be exhaustive) where a person does *not* consent. These include situations where the person is asleep or unconscious, is incapable of consenting because of the effect of alcohol or some other drug, is suffering from a physical disability that prevents him or her from communicating agreement to the act, where there is mistake as to the nature of the act or the identity of the actor, or where a person submits to sexual activity as a result of the use or threat of force. Failure to offer resistance does not constitute consent to an act. Consent to a sexual act may be withdrawn at any time before the act begins or, in the case of a continuing act, while it is taking place.

2.36 This statutory provision essentially reflects the existing common law, but it is extremely valuable to have that law crystallised in a formal statutory provision. Proof that a person did not consent, whether by reason of any of the specific factors mentioned in the new section 9 of the 1990 Act or otherwise, is not, of course, sufficient to convict an accused. The prosecution must also prove beyond a reasonable doubt that the accused was aware that the other person was not

consenting or was reckless in that regard. At present, the test of knowledge or belief is subjective, but the Law Reform Commission has recently recommended that the law should be changed so as to provide that what the prosecution should be required to prove is that the accused person (a) knew that the other person was not consenting, (b) was reckless as to whether the other person was consenting, or (c) did not reasonably believe that the other person was consenting.[35] We welcome the introduction of this more objective test of belief in consent, and we recommend that legislation should be introduced at an early date to give effect to the Commission's recommendation.

2.37 It is critically important that everyone should be aware of the legal definition of consent as free and voluntary agreement to a sexual act. This must include an awareness of the circumstances in which a person is incapable of consenting because, for example, of being asleep or under the influence of alcohol or other drug. Some consultees drew to our attention cases where the accused seemed to have entertained, as it were, a sense of entitlement to engage in sexual intercourse or other sexual act with a person who happened to be asleep, unconscious or so intoxicated as to be unable to consent in any genuine sense of the word. Every effort must be made to dispel any assumption that it is somehow acceptable to sexually assault or exploit a person who is either permanently or temporarily incapable of consenting. No less important and urgent is the need to ensure that everyone respects the principle that "no means no", irrespective of the circumstances in which a person refuses to engage in the sexual act.

2.38 Education on consent should focus on the right to personal autonomy. In the context of sexual offences, autonomy means that persons of full age and capacity are free to engage in sexual activity with willing partners of their own choosing (provided any such partner is also of full age and capacity). It further means that everyone has an absolute right to refuse to engage in sexual activity, either generally or with a particular individual or in particular circumstances. Sexual autonomy therefore entails two complementary freedoms: the freedom to engage and the freedom to refuse. Or, in more conventional rights language, it guarantees in equal measure the rights to associate and to disassociate.[36] Rape and sexual assault offences also amount to a violation of the constitutionally protected right to bodily integrity.

2.39 We are aware that a great deal of valuable work is now being done in schools, universities and elsewhere to educate young people, in particular, about the necessity and meaning of consent. We strongly commend the efforts of those who are engaging with young people on the issue of consent and making them aware of everyone's right to personal autonomy. This right, as already noted, includes the entitlement to engage in sexual activity with another consenting person of full age and capacity, as well as the unqualified entitlement of every person to refuse to engage in such activity. We are aware, for instance, that in April 2019, the Department of Education launched a

35 Law Reform Commission, *Report on Knowledge and Consent in the Law Relating to Rape* (Dublin, 2019).

36 Tom O'Malley and Elisa Hoven, "Consent in the Law Relating to Sexual Offences" in Kai Ambos, Antony Duff, Julian Roberts and Thomas Weigend (eds), *Core Concepts in Criminal Law and Criminal Justice,* Vol. 1, *Anglo-German Perspectives* (Cambridge University Press, 2020), Chap. 5.

framework for the higher education sector for promoting education about consent and preventing sexual violence, and that state funding was allocated for this initiative. We also commend the "No Excuses Campaign", a six-year national awareness campaign which is being rolled out by the Department of Justice and Equality between 2016 and 2021 to address domestic and sexual violence, and the funding that is being provided for this purpose.

2.40 We strongly recommend that steps should be taken by appropriate government departments and other state agencies to ensure that education and awareness programmes on consent are available in all second and third level educational institutions. However, this will not be sufficient of itself. Steps must also be taken to educate the wider public about the right to sexual autonomy and the centrality of consent in that context.

## INTER-AGENCY AWARENESS AND CO-OPERATION

2.41 We have already referred to many positive developments, in terms of legislation, court facilities and victim support services that have taken place in recent years. As our work progressed, we became aware of many other valuable initiatives to assist victims that had been taken by various agencies within the criminal justice system, including the Gardaí, the Probation Service, the Courts Service and the Office of the Director of Public Prosecutions. Most of these agencies, for example, have produced helpful and informative booklets and guides on the services available to crime victims. Some provide other, more specialised services for victims. However, we also found that there was little awareness of some these initiatives and services. In fact, some of the agencies indicated that they were not always aware of the services provided by others or, at least, of the full extent of those services.

2.42 It would obviously be of great benefit to all concerned and ultimately, of course, to victims who are meant to be the beneficiaries of all these services, if there were a "hub" or focal point at which the various agencies could regularly interact. We recommend that the Department of Justice and Equality establish a dedicated website accessible to all the relevant agencies that would describe, in outline at least, the services provided by each agency and provide updates on any new developments or initiatives being undertaken. It would provide links to any information booklets or other relevant material produced by each agency. We acknowledge that the present website hosted by the Department of Justice and Equality, www.victimscharter.ie already serves a very useful function in this regard.

## CONSISTENCY IN SERVICE DELIVERY

2.43 Our fourth general recommendation is that all practical steps should be taken to ensure that the range and quality of support services for victims should not depend on the court or location in which a criminal trial is held. In this connection, we welcome the decision of the Director of Public Prosecutions to establish a dedicated

Sexual Offences Unit within her office which will ultimately be responsible for the entire handling of sexual offence cases from the point at which a Garda file is submitted.[37] The responsibilities of this Unit will include making decisions on all cases including those originating outside Dublin as well as dealing comprehensively with all cases prosecuted in the higher criminal courts in Dublin. The work of this Unit, once fully established, should promote consistency of prosecution services throughout the country.

2.44 Physical facilities, especially in terms of the accommodation available within courthouses for victims and persons providing victim support, are also crucially important. The extent and quality of courthouse accommodation varies considerably across the country. On a positive note, it is good to record that, since the establishment of the Court Service in 1998, a great deal has been accomplished in terms of constructing new courthouses in large urban centres and renovating some existing ones. As noted earlier, the Criminal Courts of Justice in Dublin, which opened in 2009, has excellent facilities for victims, jurors and others. However, courthouses in many counties, including some in large urban centres such as Galway, leave much to be desired in this respect. It is to be hoped that every effort will be made to improve court accommodation in county town venues, whether through the construction of new courthouses or the renovation and extension of existing ones. This needs to be done as a matter of urgency.

2.45 The need for a consistent standard of service for victims (and, indeed, other participants) in criminal proceedings for sexual offences derives in part at least from the division of jurisdiction between the Central Criminal Court and the Circuit Court. At present, rape and aggravated sexual assault offences are tried in the Central Criminal Court which sits mainly, though not exclusively, in the Criminal Courts of Justice in Dublin. There is ordinarily one Central Criminal Court sitting full-time in Cork or elsewhere in Munster. Occasionally, the Court sits elsewhere in the country.

2.46 However, many other serious sexual offences are within the exclusive jurisdiction of the Circuit Court. Sexual assault (when prosecuted on indictment), defilement offences (involving certain sexual acts with a child under the age of 17 years), incest, child exploitation offences under ss. 3 to 8 of the Criminal Law (Sexual Offences) Act 2017, a sexual act committed by a person in authority with a child aged between 17 and 18 years contrary to s.18 of the 2017 and sexual acts committed against a person with a mental disability contrary to ss. 22 of the 2017 Act are all triable in the Circuit Court. So are all child pornography offences when prosecuted on indictment, though there is seldom any direct victim involvement in such cases. The allocation of jurisdiction over the trial of sexual offences does not come within our Terms of Reference, but we mention the matter here out of concern that the range and quality of support and services for victims should not depend on the court or locality in which a trial is held.

2.47 Some sexual offences are also dealt with in the District Court. The most notable example, for present purposes, is sexual assault which is triable either summarily or

[37] See 3.25 below.

on indictment. When a sexual assault charge is contested in the District Court, the victim will be required to attend and give evidence as in a trial in one of the higher criminal courts. It is therefore essential that adequate support and accommodation should be available for victims in the District Court.

2.48 As outlined earlier in this Chapter, special measures may and, in some instances, must be provided for victims and other witnesses in sexual offence trials. These include, for example, the entitlement to give evidence by live television link. If the relevant facilities are not available in the court building where the trial would ordinarily be held, the trial may have to be transferred to another location, perhaps a considerable distance away. This can be highly inconvenient for victims and other witnesses who are already experiencing enough stress at that point in the proceedings. This is yet another reason why steps should be taken to ensure that court buildings in which trials for sexual offences (or serious sexual offences at least) may be held are equipped to provide the same level of service and facilities of the same quality as are now, for example, available in the Criminal Courts of Justice in Dublin.

2.49 As described in Chapter 7, V-SAC (Victim Support at Court) has a permanent presence at the Criminal Courts of Justice in Dublin, as well as in certain other courts. The service provided by V-SAC's trained volunteers is of immense assistance to victims, including victims of sexual crime, who must attend or give evidence at a trial. Ideally this, or a similar type service should be available in all courts in which criminal proceedings in respect of sexual offences are held. We therefore recommend that the Department of Justice and Equality or a relevant state agency should undertake an assessment of the availability of such support services throughout the State and consider any steps that might be taken to have them provided where they are currently lacking. We are, of course, aware that other organisations as well as V-SAC also provide very valuable assistance and information for victims in court, and we acknowledge this in Chapter 7.

# CHAPTER 3: INVESTIGATION AND PROSECUTION OF SEXUAL OFFENCES

3.1 Everyone who reports a sexual offence to the Gardaí is entitled, first and foremost, to be treated with consideration, courtesy and respect. The complaint and its surrounding narrative must be treated with the utmost seriousness, and on no account should a victim feel disbelieved simply because the alleged offence is of a sexual nature. A victim's experience at this first point of contact will shape her or his attitude towards the entire criminal process that may later unfold. The willingness of other victims to report will also be strongly influenced by what they learn about the experience of those who have, in fact, approached the Gardaí. It is therefore critically important that all members of the Gardaí should be trained to deal professionally and sensitively with persons who claim to be victims of sexual crime. After all, any member of the Gardaí may have to deal with an initial complaint, even if later stages of the investigation are assigned to members with specialist training in the area.

3.2 At the outset, therefore, the Working Group fully endorses the following statement by the Commission on the Future of Policing in Ireland:

> "It is important now that An Garda Síochána should ensure that services to victims and compliance with victims' rights are embedded in the organisation's processes and that all members understand what their obligations are towards victims of crime. This applies in particular to those victims who have been traumatised by the crime, or who are marginalised in a community, for example some ethnic or other minorities. We understand that Garda recruits are now being trained in victims' needs and rights, and we recommend that such training should be extended to all members of the police service as soon as possible, with priority being given to those in the districts. District police will be on the front line helping victims in their communities."[38]

3.3 As the Commission states elsewhere in its Report, human rights must be at the foundation of modern policing. Indeed, the Garda Síochána Act 2005 (s. 7(1) includes "vindicating the human rights of each individual" as one of one the objectives of the policing and security services. The Commission goes on to say:

> "Human rights must be a central concern and an informing principle when police policies and strategies are being developed, when operations are planned and executed, and when cases are brought to a conclusion. Police leadership teams should have access to expert advice for these purposes. Front line police must always act in accordance with human rights law, taking a balanced perspective on the rights of arrested or detained persons, those of the wider public, and the rights of victims."[39]

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38 *Report of the Commission on the Future of Policing in Ireland* (Dublin, 2018), p. 21.

39 *Ibid.,* p. 11.

As reflected in this statement, police must respect the human rights of every person with whom they have professional dealings. The rights of suspected and accused persons must be scrupulously respected, and particular care must be exercised when dealing with suspects or defendants who are vulnerable by virtue of youth, old age, disability or some other factor. These rights are firmly grounded in the Constitution which protects personal liberty (Art. 40.4), the right to trial in due course of law (Art. 38.1) and other personal rights, including the right to bodily integrity (Art. 40.3).

3.4 Victims, as individuals, also have rights under the Constitution as well as under the law. Article 40.3 of the Constitution provides:

> "(1) The State guarantees in its laws to respect, and, as far as practicable, by its laws to defend and vindicate the personal rights of the citizen.
>
> (2) The State shall, in particular, by its laws protect as best it may from unjust attack and, in the case of injustice done, vindicate the life, person, good name and property rights of every citizen."

As already discussed in Chapter 2, this constitutional provision has been interpreted as guaranteeing certain rights additional to those expressly mentioned. Thus, it also protects the rights to bodily integrity, personal privacy and access to the courts. Underpinning these rights is the fundamental value of human dignity. Victims and defendants must be treated at every stage of the criminal process in a manner that acknowledges and respects their inherent dignity. Police investigators have a special responsibility in this regard, given that the experience of a victim at their first point of contact with the criminal justice system (which occurs when he or she reports an offence) will colour his or her attitude towards the remainder of the entire criminal process.

## DUTY TO CONDUCT AN EFFECTIVE INVESTIGATION

3.5 The right to freedom from torture and inhuman or degrading treatment or punishment under article 3 of the European Convention on Human Rights has been interpreted to impose a positive obligation upon member states to have in place systemic and operational measures and arrangements for the effective investigation of alleged sexual offences of a serious nature.[40] Those measures and arrangements should be such as will allow the relevant authorities to establish the facts and, whenever possible, to identify and bring to justice those responsible for the commission of such offences. As the European Court of Human Rights said in the leading case of *M.C. v Bulgaria:*[41]

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40 On the doctrine of positive obligations generally, see A.R. Mowbray, *The Development of the Doctrine of Positive Obligations under the European Convention on Human Rights by the European Court of Human Rights* (Oxford: Hart Publishing, 2004); J. Rogers, "Applying the doctrine of positive obligations in the European Convention on Human Rights to domestic substantive criminal law in domestic proceedings" [2003] Crim. L.R. 690.

41 (2005) 40 E.H.R.R. 20, para. 153.

> "… the Court considers that states have a positive obligation inherent in articles 3 and 8 of the Convention to enact criminal law provisions effectively punishing rape and to apply them in practice through effective investigation and prosecution."

In *MC,* the Court referred to rape, the offence at issue in that case, but the same principle clearly applies to other serious sexual offences as well. In fact, the Court elaborated on the point in *O'Keeffe v Ireland*:[42]

> "As to the content of the positive obligations to protect, the Court considers that effective measures of deterrence against grave acts, such as at issue in the present case, can only be achieved by the existence of effective criminal law provisions backed up by law enforcement machinery. Importantly, the nature of child sexual abuse is such, particularly when the abuser is in a position of authority over the child, that the existence of useful detection and reporting mechanisms are fundamental to the effective implementation of the relevant criminal laws."

Later in its judgment in *O'Keeffe* the Court said:

> "The Court recalls the principles outlined in *C.A.S. and C.S v Romania*[43] to the effect that article 3 [of the European Convention on Human Rights] requires the authorities to conduct an effective official investigation into alleged ill-treatment inflicted by private individuals, which investigation should, in principle, be capable to leading to the establishment of the facts of the case and to the identification and punishment of those responsible. That investigation *should be conducted independently, promptly and with reasonable expedition. The victim should be able to participate effectively.*"[44]

3.6 Courts in states that are parties to the Convention have applied this principle and, in some instances, awarded compensation to victims of sexual offences that had been inadequately investigated. In the United Kingdom, for example, compensation was awarded to victims of a London cab driver, John Worboys, who had sexually assaulted several women during the period 2003 to 2008. The United Kingdom Supreme Court dismissed an appeal on a point of law by the Metropolitan Police Commissioner (who accepted that significant errors had been made by the police in their investigation of the allegations).[45] More recently, the Northern Ireland High Court awarded compensation to a rape victim for the same reason.[46]

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42 (2014) 59 E.H.R.R. 15, para. 148 (Grand Chamber). Likewise, in *DSD and NVB v Chief Constable of the Police Service of the Metropolis* [2014] EWHC 436 QB (discussed further below), Green J. said (para. 212): "Rape and serious sexual assault fall within the category of torture and inhuman or degrading treatment or punishment."

43 (2012) Application no. 26692/05.

44 (2014) 59 E.H.R.R. 15, para. 172 (Grand Chamber). Emphasis added.

45 *D v Commissioner of Police of the Metropolis* [2019] A.C. 196. See also the judgments of the trial judge (Green J.): *DSD and NVB v Commissioner of Police of the Metropolis* [2014] EWHC 436 QB and [2014] EWHC 2493 (QB).

46 *C (A person with a disability) v Chief Constable of the Police Service of Northern Ireland* [2020] NIQB 3 (McAlinden J.).

3.7 It is accepted that not every error or lapse in the course of a police investigation of a serious offence against the person will constitute a violation of article 3 of the European Convention on Human Rights.[47] There must be a substantial and conspicuous failure to conduct a proper investigation. The United Kingdom cases mentioned earlier were brought under the Human Rights Act 1998 which provides that (1) it is unlawful for a public authority to act in a way which is incompatible with a Convention right, (2) a victim of such an unlawful act may bring proceedings before an appropriate court or tribunal, and (3) a court may grant such relief or remedy as it considers appropriate, including damages.[48] However, it must be recalled that in this jurisdiction, the European Convention on Human Rights Act 2003 provides (s. 3) that every organ of the State (which would include the Garda Síochána and the Director of Public Prosecutions) must perform its functions in a manner compatible with the State's obligations under the Convention. A person who has suffered injury, loss or damage as a result of a contravention of this requirement may, if no other remedy is available, institute court proceedings to recover damages in respect of the contravention.

3.8 The imposition of a duty to conduct an effective, thorough, independent and impartial investigation of alleged serious offences against the person, including rape and other serious sexual offences, is well justified for a number of reasons. First, the victim has a right to justice. The vindication of this right includes the prompt conduct of an investigation which has the potential to identify the offender (unless already known) and, if there is sufficient evidence, to prosecute that person and put him or her on trial. Secondly, a criminal offence is a wrong against the community as well as against the victim, where there is an identifiable one. Consequently, the community has a right to expect that offences, and serious offences in particular, will be properly investigated and prosecuted. Thirdly, prompt and effective investigation of alleged criminal offences has some deterrent impact. Or, to phrase the matter in negative terms, potential offenders will be less deterred if they are aware that there is a low risk of detention or prosecution. This is an especially important consideration in relation to sexual offences which, historically, tended to be seldom reported, investigated or prosecuted. Much has improved in this respect, but it remains vital that potential offenders should not be left with the impression that they are likely to escape prosecution. Deterrence research has consistently shown that the imposition of heavier penalties on convicted offenders has no more than a marginal impact at best on crime rates.[49] A high probability of being detected and prosecuted generally has a more powerful deterrent effect.

47 *Opuz v Turkey* (2010) 50 E.H.R.R.28, para. 129.

48 Human Rights Act 1998, ss 6.7 and 8.

49 See, for example, Andrew Ashworth, "The common sense and complications of general deterrent sentencing" [2019] Crim. L.R. 564; Michael Tonry, "Learning from the limitations of deterrence research" (2008) 37 *Crime and Justice: A Review of Research* 279

## POLICE TRAINING

3.9 The Working Group is aware that the training provided to Garda recruits at Templemore Training College includes modules dealing with victims' rights and the practices to be followed when dealing with victims of crime, including sexual crime. It is vitally important that this aspect of Garda training should be maintained and developed. It should also be subject to periodic external evaluation in order to ensure that it is being delivered to an appropriate standard and conforms to best international practice.

3.10 All serving members of An Garda Síochána engaged in front line policing should have similar training, irrespective of their rank or length of service. That training should be of the same standard as that currently provided to Garda recruits at Templemore. We therefore recommend that the Garda Commissioner should authorise a review of the extent to which serving members of the Gardaí on front line duty already have such training. He should then take whatever steps are necessary to ensure that such training is provided as expeditiously as possible to those who have not already received it.

3.11 Specialist training is obviously needed for those members of the Gardaí who are given special responsibility for investigating sexual offences. We have been informed that this training is already provided to a high standard, and that specialist interviewers are available, primarily to interview children and persons with an intellectual disability, although they may be deployed to interview other victims as well. We commend this development, but we recommend that the content and standard of such training be regularly evaluated to ensure that it conforms to best international practice and that it takes account of emerging knowledge and research in the relevant areas.

## INVESTIGATION OF SEXUAL OFFENCES

3.12 Having members of the Gardaí trained to deal professionally, effectively and sensitively with vulnerable witnesses in sexual offence cases is of the highest importance, for the reasons just outlined. But it is also essential that the setting and the environment in which such witnesses are interviewed should be suitable for that purpose. Ordinary Garda stations, even when modern and purpose built, are seldom equipped, to a desirable extent at least, to provide such facilities to an appropriate standard. In this regard, it is good to note that An Garda Síochána has undertaken a major initiative in recent years by establishing special, dedicated interview suites in various parts of the country which are designed and equipped to provide a suitable environment within which vulnerable victims can be interviewed and give statements. Vulnerable suspects are not interviewed at these suites, though it is Garda policy that they too should be interviewed by Gardaí with special training.

3.13 The precise locations of such suites are not publicised and the reason for this is stated as follows in a document entitled *Garda Síochána Policy on the Investigation of Sexual Crime Against Children. Child Welfare* (2d ed., 2013):

> "*It is essential* that the anonymity of the specific location of each interview suite and its usage is preserved. This is in order to avoid what had been described in other jurisdictions as the "walk of shame" which occurs when victims of sexual crime are forced to walk in front of strangers who can surmise as to their circumstances because the usage of the premises is widely known. It is incumbent on local management to avoid the presence of uniformed personnel (including marked Garda vehicles) at or around the interview suite."[50]

Each such interview suite is equipped to record witness statements on DVD.

3.14 The primary purpose of these dedicated interview suites is to interview victims who are under 18 years of age or who have an intellectual disability. The responsible District Officer of An Garda Síochána may authorise the use of such a suite for interviewing certain other victims, notably those of sexual crime. In so far as young victims are concerned, the special suites were originally employed for interviewing persons under 14 years of age. That upper age limit appears to have been chosen because s. 16(1)(b) of the Criminal Evidence Act 1992, as originally enacted, provided that a video recording of a statement by a victim under 14 years of age during an interview with the Gardaí was admissible at trial as evidence of any fact stated therein. However, this age limit has since been raised to 18 years. The relevant provision of the 1992 Act was amended by the Criminal Justice (Victims of Crime) Act 2017 (s. 30) to provide that a pre-recorded statement to the Gardaí "by a person who is under 18 years in relation to an offence of which he or she is a victim" is admissible at trial. The Working Group understands that it is now the practice of the Gardaí to interview victims under 18 years of age in the special suites, and it welcomes this development.

3.15 Members of the Working Group had the opportunity to visit one such suite in the Dublin area. They were greatly impressed with its layout and the available facilities. It is very well designed, and it is equipped to cater for young children as well as other witnesses. It is understood that such suites have by now been established in North Dublin, South Dublin, Cork City, Limerick City, Galway City, Waterford City, County Sligo, County Donegal and County Cavan. This represents a reasonable spread throughout the country, but it is clear that there are still some regions in which no such suite exists. Victims in those regions must therefore travel a considerable distance in some cases at least to reach the nearest suite. Many victims may find it difficult, if not impossible in some cases, to travel long distances in order to avail themselves of this special facility. Further, the conduct of an interview with a vulnerable witness in a dedicated suite, especially with its capacity to record interviews that may be admitted at trial under s. 16 of the Criminal Evidence Act 1992, as amended, may enhance the ability of such a witness to give his or her best evidence which, in turn, is essential for the overall fairness of any eventual trial and

50 Paragraph 34.4.7. Emphasis in original.

the reliability of its outcome. The Working Group recommends that the Garda Síochána should keep this situation under close review, and take steps to establish some additional suites in areas which are not within reasonably close range of an existing one.

3.16 Another positive development, which began in 2017, has been the establishment of Divisional Protective Services Units (DPSUs) on a phased basis in each Garda division throughout the State. One of the main functions of these units, which are staffed by detective sergeants and Gardaí, is to investigate alleged sexual offences. All Garda personnel attached to these units have special training in the investigation of sexual offences. The Working Group welcomes and commends this development. However, it notes that a full network of DPSUs has not yet been established throughout the State. At the beginning of 2019, ten DPSUs had been established across nine Garda divisions. It was then planned that Units would be established in the remaining 19 divisions throughout 2019. However, several Garda divisions still do not have such a Unit. The Working Group notes that the Garda Inspectorate Report of December 2017 had recommended the complete roll-out of these units by the end of 2018.[51] We therefore recommend that steps be taken as a matter of urgency to ensure a complete roll-out during 2020, if at all possible. In fact, we were minded to recommend that the roll-out be completed by the middle of 2020. However, we now recognise that, owing to the impact of Covid-19, many developments of this nature must inevitably be delayed or put on hold. But we strongly recommend that the roll-out be completed as soon as at all practicable.

3.17 Finally, in this regard, the Working Group recommends that the operation of dedicated interview suites be periodically evaluated by an appropriate external person or body. This evaluation should include consultation and engagement with victims who have been interviewed by the Gardaí in that setting (and who are willing to be interviewed for the purpose of the evaluation) as well as with specialist Garda interviewers. Its conclusions would be valuable in identifying any changes or improvements that might usefully be made to the current system.

## PROSECUTION POLICY AND PRACTICE

3.18 Once the Gardaí have completed their investigation and submitted a file to the Director of Public Prosecutions, it falls to the Director to decide if a prosecution should be initiated and, if there is to be a prosecution, to determine the charges that should be brought. The Director is by law a civil servant in the service of the State and is required to be independent in the performance of his or her duties.[52] She is solely responsible for the prosecution of serious crime. Article 30.3 of the Constitution provides:

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51 Garda Inspectorate, *Responding to Child Sexual Abuse: A follow up Review from the Garda Inspectorate* (Dublin, 2017), Recommendation 3.9 (p. 191).

52 Prosecution of Offences Act 1974, s. 2 (4) and (5).

> "All crimes and offences prosecuted in any court constituted under Article 34 of this Constitution other than a court of summary jurisdiction shall be prosecuted in the name of the People and at the suit of the Attorney General or some other person authorised in accordance with law to act for that purpose."

Pursuant to this provision, the Prosecution of Offences Act 1974 transferred the function of prosecuting serious offences to the newly created office of Director of Public Prosecutions. (Any residual prosecution functions vested in the Attorney General are not relevant in the present context). The Director is independent in the performance of her functions and must act independently when deciding if a prosecution should be initiated in any given case and, if it is, in deciding on the charge(s) to be brought.

3.19 The criteria governing decisions to prosecute are set out in the *Guidelines for Prosecutors*, new editions of which are published periodically by the Director. In the 5th edition of the *Guidelines,* published in December 2019, it is stated:

> "As in other common law systems, a fundamental consideration when deciding whether to prosecute is whether to do so would be in the public interest. A prosecution should be initiated or continued, subject to the available evidence disclosing a prima facie case, if it is in the public interest and not otherwise."[53]

The *Guidelines* proceed to specify in detail the factors to be considered when determining if the evidence is sufficient to justify a prosecution. The essential question is whether "there is admissible, relevant, credible and reliable evidence which is sufficient to establish that a criminal offence known to the law has been committed by a suspect. The evidence must be such, that a jury properly instructed on the relevant law, could conclude beyond a reasonable doubt that the accused was guilty of the offence charged."[54] In most cases, once this criterion is satisfied, a prosecution will ensue. Regard must also be had to the public interest element which may sometimes favour not prosecuting. This might occur, for example, where the offence was minor in nature, had caused little harm or was unlikely to attract nothing more than a very lenient penalty. Other factors to be considered for this purpose include the attitude of the victim or the victim's family to a prosecution, and the likely effect on the victim or the victim's family of a decision to prosecute or not to prosecute. Importantly, however, the more serious the offence, the more the public interest will favour a prosecution.[55]

3.20 The Working Group notes with approval these criteria which are reasonable and appropriate.

3.21 The question of whether public prosecutors should be required to give reasons for their decisions has been the subject of debate in many countries during the past few decades. Attention was obviously focused on decisions not to prosecute. When a

53 Paragraph 4.4.
54 Paragraph 4.10.
55 Paragraphs 4.20-4.24.

prosecution is taken, the reasons for doing so will be apparent from the evidence tendered to the trial court. At one time, it was the general practice, here and elsewhere, never to give any explanation, publicly or otherwise, for decisions not to prosecute. There are obviously good reasons why a prosecutor should not publicly state why a particular individual was not prosecuted. Such a statement could leave an enduring cloud of suspicion over the person in question, and he or she could do little to remove it.

3.22 More recently, however, steps have been taken to bring greater transparency and accountability to the prosecution process. In this country, the Director of Public Prosecutions has, for more than 20 years now, published an annual report with detailed statistical analyses of the workload of the office, including the number of files received from the Gardaí, the length of time taken to issue directions and the number of cases in which prosecutions were and were not initiated. The Director's most recent annual report shows that in recent years decisions not to prosecute were taken in respect of about 40 per cent of suspects.[56] The reason in most of these cases (77 per cent in 2018) was insufficiency of evidence. In other cases (6 per cent in 2018), the injured party had withdrawn the complaint.

3.23 The other major initiative taken by the Director of Public Prosecutions was to provide reasons for decisions not to prosecute to victims and their families. When first introduced on a pilot basis in 2008, the scheme was confined to alleged offences which had resulted in a fatality. Following the coming into direct effect of the EU Directive on Victims' Rights it was extended in 2015 to other offences, including sexual offences. However, the matter is now governed by the Criminal Justice (Victims of Crime) Act 2017 (s. 8) which provides that a victim may request a summary of the reason not to prosecute a person for an alleged offence. This applies to any decision not to prosecute made on or after 16 November 2015, or a decision in relation to the death of a victim which occurred on or after 22 October 2008. There are certain circumstances in which the Director is not required to provide a summary of reasons not to prosecute. For instance, she is not required to do so if it would interfere with the investigation of an offence, prejudice ongoing or future criminal proceedings, endanger the safety of any person or endanger the security of the State. A special Victims Liaison Unit has been established within the office of the Director of Public Prosecutions to deal with such requests.

3.24 The Working Group notes with approval the general information provided by the Director, both in the *Guidelines for Prosecutors* and in her Annual Reports. It welcomes the enactment and implementation of s. 8 of the Criminal Justice (Victims of Crime) Act 2017 and the establishment in 2015 of a special unit within the Director's office to deal with requests and enquiries from victims.

3.25 The Working Group also welcomes a further initiative which was announced by the Director of Public Prosecutions in December 2019. Addressing the Annual Prosecutors Conference, she announced the establishment of a dedicated Sexual

56 Director of Public Prosecutions, *Annual Report 2018* (Dublin, 2019).

Offences Unit within her office in 2020.[57] This Unit will be responsible for handling all matters relating to the prosecution and trial of sexual offences. At present, different stages of the process are handled by different units within the office. Following the establishment of this Unit, for which additional government funding has been promised, all sexual offences prosecuted in the Central Criminal Court and the Dublin Circuit Criminal Court will be handled by the unit, and it will make prosecution decisions in respect of all sexual offence cases originating outside Dublin. It will take a lead in setting policy on the management and handling of such cases throughout the country, and it will pay particular attention to issues connected with the treatment of victims.

3.26 The Working Group is confident that this development will enhance the way in which sexual offence cases are managed and conducted from the time at which a file is received by the Director's Office until the matter is finally disposed of. The Working Group is glad to note that the Government has committed itself to funding this new Unit in 2020 and to provide full funding from 2021 onwards. We recommend that the Government adhere to this commitment in light of the importance of this development for victims and, indeed, for others involved in criminal proceedings for sexual offences. It will be important that as the initiative is rolled out that this support will extend to any resource adjustments required in light of experience and having regard to trends in sexual offences complaints.

57 www.dppireland.ie/app/uploads/2019/12/Directors-opening-address.pdf

# SUMMARY OF RECOMMENDATIONS

- **All serving members of An Garda Síochána engaged in front line policing should be trained in the principles and practices to be followed when engaging with victims of sexual crime, and with other witnesses (including suspects) who may be vulnerable by virtue of age, disability or some other factor.**

- **The specialist training provided for those members of An Garda Síochána assigned to interview victims and other vulnerable witnesses, as well as the training provided for Garda recruits, should be regularly monitored by external experts to ensure that it is of the requisite standard and that it conforms with best international practice.**

- **Urgent steps should be taken to ensure that there is a complete roll out of Divisional Protective Services Units as soon as possible.**

- **An Garda Síochána should keep under review the number and geographical spread of special interview suites throughout the State in order to ensure that all vulnerable victims have reasonably convenient access to such a suite.**

- **The operation of the specialist interview suites should be periodically evaluated by an external expert who would seek the views of victims who had been interviewed within them, relevant members of An Garda Síochána and others.**

- **We recommend that the additional funding promised to the Office of the Director of Public Prosecutions to establish and maintain the new Sexual Offences Unit be delivered commensurate with the requirements.**

# CHAPTER 4: ANONYMITY, PUBLIC ATTENDANCE AND MEDIA REPORTING OF SEXUAL OFFENCE TRIALS

## VICTIM ANONYMITY

4.1 Under the law as it stands, the victim in a trial for a sexual assault offence is entitled to anonymity. A "sexual assault offence" for this purpose includes a rape offence as well as aggravated sexual assault, sexual assault and associated offences such as aiding and abetting. Section 7(1) of the Criminal Law (Rape) Act 1981, as amended, provides:

> "Subject to subsection (8) (a), after a person is charged with a sexual assault offence no matter likely to lead members of the public to identify a person as the complainant in relation to that charge shall be published in a written publication available to the public or be broadcast except as authorised by a direction given in pursuance of this section."

It will be noted that the victim's right to anonymity takes effect once a person is charged with a sexual assault offence, and not just from the beginning of the trial. Any publication or broadcast that contravenes this provision amounts to a criminal offence which is punishable with a term of imprisonment not exceeding three years, a fine or both. The prohibition is not absolute to the extent that it is possible for an application to be made to a judge of the High Court or the Circuit Court for a direction that the prohibition on identifying the victim shall not apply. The application must be made by the accused or another person against whom the victim may be expected to give evidence. However, the applicant must show that the direction is needed for the purpose of inducing persons to come forward who are likely to be needed as witnesses at the trial, and that the conduct of the applicant's defence at the trial is likely to be adversely affected if the direction is not given. It seems to be rare in the extreme for such an application to be made or granted. In fact, no member of the Working Group can recall such an application.

4.2 Obviously, much has changed since this provision was first enacted in 1981 and amended somewhat in 1990. At that time, the "media" effectively consisted of print publications, radio and television. Nowadays, information about criminal trials is just as likely to circulate on the Internet and on social media, perhaps even more than in the traditional media. Section 7(7) of the 1981 Act contains the following definitions:

> "In this section – "a broadcast" means a broadcast by wireless telegraphy of sound or visual images intended for general reception, and cognate expressions shall be construed accordingly; "written publication" includes, a film, a sound track or any other record in permanent form but does not include an indictment or other document prepared for use in particular legal proceedings."

This may be contrasted with the more modern definitions contained in s. 30 of the Criminal Law (Sexual Offences) Act 2017, protecting the identities of the accused and victim in incest proceedings: Section 30(5) of the 2017 Act provides:

> "broadcast" means the transmission, relaying or distribution by wireless telegraphy or by any other means or by wireless telegraphy in conjunction with any other means of communications, sounds, signs, visual images or signals, intended for direct reception by the general public, whether such communications, sounds, signs, visual images or signals are actually received or not.
>
> "published" means published to any person, and includes published on the internet;
>
> "publication" includes a film, sound track or any other record in permanent form (including a record that is not in legible form but which is capable of being reproduced in a legible form) but does not include an indictment or other document prepared for use in particular legal proceedings."

In any future general review of the law relating to sexual offences, the definitions of "broadcast", "written publication" and cognate terms as they appear in the Criminal Law (Rape) Act 1981 and other relevant legislation should be reviewed and, if necessary, updated to reflect modern technological developments.

4.3 Section 30 of the Criminal Law (Sexual Offences) Act 2017, to which reference has just been made, deals specifically with the trial of incest offences. Once a person is charged with an incest offence, no matter likely to lead members of the public to identify either the accused or the person against whom the offence is alleged to have been committed shall be published or broadcast. Contravention of this prohibition is an offence punishable, following conviction on indictment, with a prison term not exceeding three years, a fine or both. Such an offence may also be dealt with summarily. The prohibition on identifying the parties in incest proceedings is absolute, and it may not be lifted even by court order. This seems appropriate given the special sensitivity attaching to proceedings for such offences.

4.4 New sexual offences against children were created by the Criminal Law (Sexual Offences) Act 2006 (replacing the former "unlawful carnal knowledge" offences under the Criminal Law Amendment Act 1935 as a consequence of the Supreme Court decision in *CC v Ireland* [2006] 4 I.R. 1) and the Criminal Law (Sexual Offences) Act 2017. Sections 2 and 3 of the 2006 Act created offences of engaging in a sexual act with a child under the ages of 15 and 17 years respectively.[58] These are commonly known as defilement offences. Section 3A of the 2006 Act inserted by s. 18 of the 2017 Act creates a new offence of engagement in a sexual act by a person in authority with a young person aged between 17 and 18 years. Sections 3 to 8 of the 2017 Act

[58] Sections 2 and 3 of the 2006 Act, as substituted by ss. 16 and 17 of the Criminal Law (Sexual Offences) Act 2017.

create entirely new offences dealing with what may broadly be described as child sexual exploitation.

4.5 The anonymity provisions relating to victims in proceedings for a "sexual assault offence" (as described at Paragraph 1 above) are applied to victims in proceedings for an offence contrary to the Criminal Law (Sexual Offences) Act 2006.[59] It also applies to the offence of soliciting or importuning a child for the purpose of committing a sexual offence under s. 6 of the Criminal Law (Sexual Offences) Act 1993. There does not seem to be any similar provision extending anonymity to a person against whom an offence contrary to any of sections 3 to 8 of the 2017 Act is committed. However, s. 252 of the Children Act 2001 provides:

> "(1) Subject to subsection (2), in relation to any proceedings for an offence against a child or where a child is a witness in any such proceedings –
>
> (a) No report which reveals the name, address or school of the child or includes any particulars likely to lead to his or her identification, and
> (b) No picture which purports to be or include a picture of the child or which is likely to lead to his or her identification,
>
> shall be published or included in a broadcast.
>
> (2) The court may dispense to any specified extent with the requirements of subsection (1) if it is satisfied that it is appropriate to do so in the interests of the child.
>
> (3) Where the court dispenses with the requirements of subsection (1), the court shall explain in open court why it is satisfied it should do so.
>
> (4) Subsections (3) to (6) of section 51 shall apply, with the necessary modifications, for the purpose of this section.
>
> (5) Nothing in this section shall affect the law as to contempt of court."

The effect of subsection (4) is to make contravention of the section an offence punishable, following conviction on indictment, with a fine not exceeding £10,000 or imprisonment for a term not exceeding 3 years or both. A child for the purpose of the Children Act 2001 is a person under the age of 18 years, and all of the offences created by ss. 3 to 8 of the Criminal Law (Sexual Offences) Act 2017 are so defined as to involve victims under that age. Therefore, the anonymity of all such persons is protected by virtue of s.252 of the Children Act 2001.

4.6 The situation regarding offences against mentally ill or mentally disabled persons is less certain. Part 3 of the Criminal Law (Sexual Offences) Act 2017 created two new offences of (1) a sexual act with a protected person, and (2) a sexual act by a person in authority with a relevant person. A "protected person" and a "relevant person" are persons with defined degrees of mental or intellectual disability or mental illness.

[59] Criminal Law (Sexual Offences) Act 2006, s. 6.

There does not appear to be any provision directly conferring anonymity on the victim in such a case. The Working Group is of the view that victims of these offences should also be entitled to anonymity.

4.7 The Working Group is of the view that the provisions in the Criminal Law (Rape) Act 1981 and the Criminal Law (Sexual Offences) Act 2017 should be retained and does not recommend any amendment, except perhaps in relation to the definitions of "broadcast" and "published".

## ANONYMITY OF ACCUSED PERSONS

4.8 The grant of anonymity to accused persons in sexual offence cases is a rather more contested issue. Some would argue that the same law should apply to all accused persons, irrespective of the nature of the offence. This, of course, would mean that persons charged with sexual offences, unless they were minors or unless the disclosure of their identity would also identify the victim, could lawfully be identified. However, the law as it now stands makes an exception for persons charged with "rape offences", a term which is defined to cover rape, rape contrary to s. 4 of the Criminal Law (Rape) (Amendment) Act 1990 and the usual associated offences such as attempt, aiding and abetting and so forth. As already noted, victims are entitled to anonymity in all trials for a "sexual assault offence", a term which covers sexual assault and aggravated sexual assault and associated offences as well as rape offences. There does not seem to be any logical reason why accused persons should be entitled to anonymity in, say, a rape trial but not in a sexual assault trial. The Working Group believes that the same rule should apply irrespective of whether the offence being tried is a rape offence or a sexual assault offence. As already noted, there is an absolute prohibition on revealing the identity of an accused in an incest trial.

4.9 The grant of anonymity to accused persons was considered at some length by the Law Reform Commission in its Consultation Paper and Report on Rape and Allied Offences which were published in the late 1980s.[60] In its Consultation Paper, the Commission had provisionally recommended removing defendant anonymity. However, in light of various arguments made against that suggestion, the Commission changed its mind and finally recommended that existing restrictions on the publication of defendants' names (under the Criminal Law (Rape) Act 1981) be retained. That has remained the position since. One argument made at the time in favour of retaining defendant anonymity was that basic fairness required that if victims were entitled to anonymity, so should defendants. Other arguments related to the degree of publicity rape trials tend to attract and the consequent reputational damage that may be suffered by acquitted defendants. The Commission was not persuaded by the first of these arguments and, although it did not elaborate very much on the reason for its final recommendation, it seems to have found the others more persuasive.

[60] Law Reform Commission, *Consultation Paper on Rape* (1987); *Report on Rape and Allied Offences* (1988).

4.10 In considering this matter afresh, it should be noted that s. 8 of the Criminal Law (Rape) Act 1981, as amended, does not confer an absolute right to anonymity on accused persons in rape offence cases. What s. 8(1) provides is that after a person is charged with a rape offence, no matter likely to identify him or her as the person charged shall be published or broadcast *except* where a direction to the contrary is given under the terms of the section itself or after the person has been convicted of the offence. Essentially, therefore, the accused has a limited guarantee to anonymity during the trial only. He or she can be identified if convicted, unless to do so would also lead to the identification of the victim. Acquitted defendants retain their anonymity. Secondly, an application may be made to the court in certain circumstances to remove anonymity and, importantly, the Director of Public Prosecutions may apply to the High Court to have the anonymity removed and the judge, if satisfied that it is in the public interest to do so, "shall direct that subsection (1) shall not apply to such matter relating to the person charged with the offence as is specified in the direction."

4.11 The major justification for according anonymity to accused persons today is that even being prosecuted for a sex offence, let alone being convicted of one, carries a very heavy stigma. Moreover, it is a social stigma that an acquittal may do little to mitigate or remove. With due respect to the Law Reform Commission, there is also some force in the argument that, in the interests of equality, the grant of anonymity to all victims should be matched by an entitlement to anonymity on the part of accused persons. One of the standard counter-arguments is that the publication of an accused person's name may encourage other victims to come forward. In response to this, it may be noted that s. 8 of the Criminal Law (Rape) Act, as described in the previous paragraph, allows for the removal of an accused person's anonymity in certain circumstances by court order. Secondly, we have not been furnished with any evidence that the existing law has caused any problems in this regard. The vast majority of our consultees favoured the retention of the present law and so do we, subject to the additional recommendation set out immediately below.

4.12 Having decided to recommend that persons charged with "rape offences" should retain their right to anonymity, we see no reason why this right should not be extended to those who are charged with "sexual assault offences" as well. After all, many of these offences are also very serious. Aggravated sexual assault carries a maximum sentence of life imprisonment (the same maximum as for rape and rape contrary to s. 4 of the 1990 Act). Sexual assault now carries a maximum sentence of 10 years' imprisonment, and a maximum of 14 years if the victim was under the age of 17 years at the time of the offence. We therefore recommend that, at a minimum, s. 8(1) of the Criminal Law (Rape) Act 1981 should be amended so as to substitute "sexual assault offence" for "rape offence."

4.13 A person charged with a so-called defilement offence contrary to s. 2 or s. 3 of the Criminal Law (Sexual Offences) Act 2006 (as substituted by the Criminal Law (Sexual Offences) Act 2017) is entitled to anonymity on the same basis as currently applies to a person charged with a rape offence. This is specified in s. 6 of the 2006 Act and we

do not recommend any change in this respect. Section 18 of the 2017 Act introduced a new offence which is committed when a person in authority engages in a sexual act with a young person aged between 17 and 18 years. However what s. 18 does is to insert a new s. 3A into the 2006 Act. That in turn means that defendant anonymity also applies to this offence.

4.14 Rape and sexual assault offences are not the only offences of a sexual nature that attract a high degree of social stigma. It is now well accepted that the collateral consequences of a conviction for certain offences can sometimes be more severe and enduring than the penalty judicially imposed, and there is now an extensive academic literature on this topic. Indeed, it also true that the very fact of being investigated or charged, if publicised, can inflict profound reputational damage even if the person investigated or charged is not prosecuted or is prosecuted but acquitted.

4.15 Consideration should also be given to the anonymity of persons charged with other sexual offences, especially the new child exploitation offences created by ss. 3 to 8 of the Criminal Law (Sexual Offences) Act 2017, and sexual offences against persons with mental illness and intellectual disability. It seems only logical that a person charged with any of these offences should be entitled to anonymity on the same basis as a person charged with a rape offence or, as we now recommend, with a sexual assault offence. The same considerations must surely apply to these new offences as apply to existing sexual assault offences, particularly the stigmatising element. As already noted, the child involved in any offence contrary to ss. 3 to 8 of the 2017 Act may not be identified. In many instances, this would also preclude identifying the accused. However, this would not be invariably true. We therefore recommend that serious consideration should be given to introducing legislation to confer anonymity on persons charged with an offence contrary to ss. 3 to 8, 18, 21 and 22 of the 2017 Act. Needless to say, an accused person could be identified if convicted unless this would lead to the identification of the victim.

4.16 Right now, few offences attract more social opprobrium and stigma than the possession, distribution or creation of child pornography. Nobody can reasonably deny the gravity and harm of such conduct. Child pornography is almost invariably the product of child sexual abuse some of which can be particularly violent and degrading in nature. Those who create such pornography, who trade in it and even those who possess it are contributing in a very real way to this abuse and exploitation wherever it may occur. If convicted, they deserve to be punished and, of course, to be identified except in those relatively rare cases where to do so would also identify the child being depicted. The collateral consequences of a conviction for such an offence can be very significant, especially in terms of the social ostracisation and, in many cases, the unemployability of the convicted person and for the reputation of their family within a community. It is also true that the identification of a person as a suspect or accused in a child pornography investigation can have serious consequences for him (and persons accused of this offence are almost invariably male), and the social stigma will not always evaporate with an acquittal. This raises the question of whether a person charged with a child pornography offence should also perhaps be entitled to anonymity unless convicted.

4.17 It seems clear that a trial judge is not entitled to impose a restriction on the reporting of an accused person's name solely in order to protect that person's right to privacy. The matter arose for consideration in *Independent Newspapers (Ireland) Ltd v Judge Anderson*[61] where the respondent District Court judge had made an order restricting the publication of the identity of a person charged with possessing child pornography. He later refused a press application to lift the restriction. His order was successfully challenged by way of judicial review proceedings brought by the applicant newspaper group. As the High Court (Clarke J.) noted, regard had to be had first and foremost to Article 34.1 of the Constitution which requires that, save in such special and limited cases as may be prescribed by law, justice shall be administered in public. Further, having regard to earlier authorities, notably *Irish Times v Ireland*[62], the Court held that any restrictions on the reporting of court proceedings are governed by the following principles:

(1) An order restricting such reporting can be made only where there is an express legislative provision to that effect, and
(2) In the event that the relevant legislative provision contains a discretion, the court must be satisfied that to have the case heard in public would fall short of doing justice; or
(3) In the event that there is no express legislative provision the court must be satisfied that:
    a. There is a real risk of an unfair trial if the order is not made, and
    b. The damage which would result from not making the order would not be capable of being remedied by the trial judge either by appropriate directions to the jury or otherwise.

Clarke J. went on to say:

> "It seems to me clear, therefore, that in the absence of an express statutory limitation on reporting, the general constitutional discretion identified in *Irish Times v Ireland* [1998] 1 I.R. 359 only applies to cases where it can properly be said, in accordance with the principles set out in that case, that the accused's right to a fair trial may require the reporting restrictions. The undoubted effect which the public knowledge of the existence of criminal proceedings against an individual may have on certain other rights of such individual is not, on the basis of those authorities, a justification for departing from the clear constitutional imperative specified in Article 34.1 to the effect that justice must be administered in public."

4.18 On the basis of this and earlier authorities, it may seem that it would be possible to have an express statutory provision restricting the publication of the names of persons accused of child pornography offences. However, on balance, the case for such a provision, even if it withstood constitutional challenge, is not particularly strong. A question would arise as to how many other offences should be treated in a

61 [2006] 3 I.R. 341
62 [1998] 1 I.R. 359

similar fashion. For example, the new offence of purchasing sexual services, introduced by Part 4 of the Criminal Law (Sexual Offences) Act 2017, may be purely summary in nature and punishable solely with a fine. Yet, a person charged with such an offence may suffer severe embarrassment and other consequences. In all such cases, it should of course be recalled that while the media are entitled to publish the names of accused persons, they are not obliged to do so. But to introduce further restrictions on the reporting of such proceedings could gradually whittle away the constitutional presumption that court proceedings, civil and criminal, should be held in public unless there are compelling reasons for legislating or deciding to the contrary.

## EXCLUSION OF THE PUBLIC FROM SEXUAL OFFENCE TRIALS

4.19 The Criminal Law (Rape) Act 1981, s. 6(1) (as amended by the Criminal Law (Rape) (Amendment) Act 1990, s. 11) provides:

> "Subject to subsections (2), (3) and (4), in any proceedings for a rape offence or the offence of aggravated sexual assault or attempted aggravated sexual assault or of aiding, abetting, counselling or procuring the offence of aggravated sexual assault or attempted aggravated sexual assault or incitement to the offence of aggravated sexual assault or conspiracy to commit any of the foregoing offences, the judge, the justice or the court, as the case may be, shall exclude from the court during the hearing all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the press and such other persons (if any) as the judge, the justice or the court, as the case may be, may in his or its discretion permit to remain."

Section 6 goes on to provide that when an application is being made to question a victim about her or his sexual experience, all persons except officers of the court and those directly concerned in the proceedings shall be excluded from the court. However, a parent, relative or friend of the victim is always entitled to remain in court, and the same applies to an accused who is not of full age. Finally, s. 6(4) provides that in any proceedings to which this section applies, "the verdict or decision and the sentence (if any) shall be announced in public." We shall comment on this subsection later.

4.20 Section 6 of the 1981 Act applies also to proceedings for offences contrary to ss. 2, 3 and 3A of the Criminal Law (Sexual Offences) Act 2006 (so-called defilement offences).[63]

4.21 There is a similar provision in relation to proceedings for incest offences. Section 29 of the Criminal Law (Sexual Offences) Act 2017 provides:

63 Criminal Law (Sexual Offences) Act 2006, s. 6.

(1) In any proceedings for an offence under the Act of 1908, the judge or court, as the case may be, shall exclude from the court during the hearing all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the press and such other persons (if any) as the judge or the court, as the case may be, may, in his, her or its discretion, permit to remain.
(2) In any proceeding to which subsection (1) applies the verdict or decision and the sentence (if any) shall be announced in public.

4.22 Under the Children Act 2001, s. 257, in any criminal proceedings, when a person who appears to the court to be a child is called as a witness, the court may exclude from the court during the taking of his or her evidence all persons except officers of the court, persons directly concerned in the proceedings, *bona fide* representatives of the press and such other persons (if any) as the court may in its discretion permit to remain. While this section is drafted in permissive terms (the court *may* exclude), it will likely be used in any case where a child is giving evidence in proceedings for any of the new offences under ss 3 to 8 of the Criminal Law (Sexual Offences) Act 2017.

4.23 The Criminal Justice (Victims of Crime) Act 2017, s. 20 now confers a more general right to exclude the public in certain circumstances. Section 20(1) provides:

> "In any proceedings relating to an offence, where a court is satisfied –
>
> (a) That the nature or circumstances of the case are such that there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and
> (b) It would not be contrary to the interests of justice in the case,
>
> the court may, on the application of the prosecution, exclude from the court during such proceedings – (i) the public or any portion of the public, or (ii) any particular person or persons, except officers of the court and *bona fide* representatives of the press."

This power is without prejudice to the right of certain persons, such as parents, relatives, support workers and so forth to remain in court. This is a welcome provision as it compensates to a considerable extent for any gaps in the law relating to the exclusion of the public in proceedings for sexual offences, given that the law in this respect has developed in somewhat piecemeal fashion.

4.24 In short, the only recommendation we make in respect of these provisions is that they should be retained, although s. 6 of the 1981 Act should be extended to include other sexual offences which do not currently seem to be covered. All our consultees were agreed that criminal proceedings for sexual offences should take place otherwise than in public. After all, our current arrangements cannot be said to amount to secret justice. *Bona fide* representatives of the press are always entitled to be present and to report on the proceedings, while respecting the anonymity of the victim and accused, except where an application is being made to question a victim about her or his sexual experience. Secondly, the presence of members of the public can undoubtedly

add to the stress experienced by victims and other witnesses during a trial for rape or another sexual assault offence. Thirdly, unregulated access to the court during such trials increases the risk that the identity of the victim, the accused or both will be disclosed, especially over social media. In this regard, the Working Group welcomes the Practice Direction (SC18) issued by the Chief Justice in 2018 restricting the use of cameras, electronic devices and the transmission of live text-based communications during court proceedings.

4.25 The Working Group recommends that the provisions of s. 6 of the Criminal Law (Rape) Act 1981 as amended should apply to all sexual assault offences, and not just as at present to rape offences and aggravated sexual assault offences. It seems incongruous to say the least that proceedings for sexual assault can, on the face of it, be held in public although the very same considerations, as set out in the previous paragraph, should apply. Granted s. 20 of the Criminal Justice (Victims of Crime) Act 2017, quoted above, will help to alleviate many of the problems that may arise in this regard but, as has become clear from some recent cases, it would be preferable to have a specific statutory provision requiring sexual assault trials to be held otherwise than in public.

4.26 As already noted, both s. 6 of the Criminal Law (Rape) Act 1981 and s. 29 of the Criminal Law (Sexual Offences) Act 2017 (which deals with incest proceedings) provide that, even where the public must be excluded, the verdict or decision and sentence (if any) shall be pronounced in public. This could be taken to mean that the doors of the court should be re-opened to the public as soon as the verdict is to be announced and when sentence is being imposed. In practice, that does not happen and there is a strong case to be made that it should not happen. Admitting the public at these stages of the trial could easily lead to the identification of the victim, the accused or both. Obviously, if the verdict is one of guilty, the accused's identity can then be revealed unless to do so would reveal that of the victim. Furthermore, *bona fide* representatives of the press are entitled to be present at these stages which means that verdicts, decisions and sentences (if any) can be fully reported. The Working Group recommends that s. 6(4) and s. 29(2) and any similar provisions in other legislation be repealed.

4.27 As already noted, in most instances where the law requires the exclusion of the general public, *"bona fide* representatives of the press" are entitled to remain present at trial. That term is not defined anywhere in the relevant legislation, but it presumably refers to journalists and reporters who are expressly assigned to cover court cases by a newspaper or broadcaster. After all, the legislation refers to "representatives of the press" rather than, for example, "journalist". However, the term is broad enough to include persons employed by press agencies who report on court proceedings for media organisations as well as journalists and reporters directly employed by newspapers, broadcasters and other media outlets including on-line media. A court is always entitled to investigate if a person who appears to be in attendance as a media representative is, in fact, a *bona fide* representative of the press. After all such a person may not lawfully be present unless he or she comes within the definition of that term.

4.28 Representatives of the press have an ethical duty to report court proceedings fairly and accurately. Newspapers and broadcasters cannot, of course, be expected to provide a full account of everything said in the course of a trial. Rather their obligation is to provide a fair, accurate and objective account of the proceedings. What must be deprecated in the extreme is any practice of isolating particular statements which appear controversial when taken out of context and giving these statements prominence in media reports of criminal trials. Such a practice can be seriously unfair to the person to whom such a statement is attributed unless it is placed in context. Moreover, it ill serves the cause of justice, whether viewed from the perspective of the accused, the victim or, indeed, the public on whose behalf criminal proceedings are conducted.

# SUMMARY OF RECOMMENDATIONS

- **Victims in all trials for sexual assault offences should remain entitled to anonymity, irrespective of the outcome of the trial.**

- **Introduce legislation to extend anonymity to victims in trials for offences contrary to ss. 21 and 22 of the Criminal Law (Sexual Offences) Act 2017. These sections deal with sexual abuse of persons with mental illness or a mental or intellectual disability.**

- **Accused persons in all trials for sexual assault offences, and not just in trials for rape offences as at present, should be entitled to anonymity unless convicted. If convicted, they may be identified unless to do that would lead to the identification of the victim.**

- **Persons accused of any offence contrary to ss. 3 to 8 of the Criminal Law (Sexual Offences) Act 2017 (which outlaw various forms of child sexual exploitation) should be entitled to anonymity on the same basis as now applies to an accused on trial for a rape offence.**

- **The definitions of "published" and "broadcast" in the Criminal Law (Rape) Act 1981 should be reviewed to ensure that they are sufficiently comprehensive to cover publication in electronic media, including social media.**

- **Express statutory provision (in terms similar to those currently contained in s.6 of the Criminal Law (Rape) Act 1981) should be made for the exclusion of the public from the trials of other sexual offences that are not covered by existing legislation, where a victim may be called upon to give evidence or where there is a risk that the victim's identity might be publicly revealed.**

- **Those provisions in, for example, s. 6(4) of the Criminal Law (Rape) Act 1981 and s. 29(2) of the Criminal Law (Sexual Offences) Act 2017 which require that, even where a trial is held otherwise than in public, the verdict and sentence (if any) must be announced in public should be repealed.**

# CHAPTER 5: PRELIMINARY TRIAL HEARINGS

5.1 In this Chapter, we recommend the introduction of preliminary trial hearings which should help to reduce delays in the overall trial process. Were such a system to be formally established, as we recommend, it would also allow for certain matters such as applications to question a victim under s. 3 of the Criminal Law (Rape) Act 1981, the appointment of intermediaries and issues connected with disclosure to be addressed well in advance of the trial itself. This, in turn, should reduce the likelihood of a trial having to be adjourned in order, for example, for full disclosure to be made. It should also ensure that appropriate arrangements can be made in a timely manner to provide effective legal representation for a victim who is to be questioned under s. 3 of the 1981 Act and to provide for an intermediary where one has not already been appointed.

5.2 One of the defining characteristics of the common-law adversarial trial process is that trials are meant to be compressed rather than episodic.[64] Once a trial begins, it should proceed to a conclusion without interruption.[65] That, at least, was the traditional ideal. However, in most common-law countries today, criminal trials for serious offences are often preceded by one or more preliminary hearings that are designed to promote efficiency and economy of time in the conduct of the trial itself. Decisions taken at a preliminary trial hearing may be quite significant, especially if they include rulings on the admissibility of evidence or, in the case of a sexual offence, on an application to question a victim about her or his sexual experience. Preliminary trial hearings to deal with matters that do not fall to be determined by the tribunal of fact, the jury in a criminal trial, can certainly promote efficiency as well as being in ease of witnesses and persons called upon to act as jurors.

5.3 Article 38.5 of the Constitution of Ireland provides that, with certain exceptions, "no person shall be tried on any criminal charge without a jury." Therefore, a person on trial in the Central Criminal Court or the Circuit Criminal Court is being tried *with* a jury, rather than just *by* a jury.[66] The presiding judge also has a crucially important role, especially in deciding all questions of law. The admissibility of evidence, being a question of law rather than one of fact, is a matter for the judge alone to decide. When a dispute arises about the admissibility of evidence (or any other matter classified as a question of law), it must be resolved by the judge in the absence of the jury. This is done by way of a trial within a trial. Depending on the complexity of the legal issues and the nature of the arguments, the jury may be sent out (or indeed sent home) for a considerable period of time until the issue in question has been judicially determined. This can be quite disruptive for jurors as it extends the period during which they must make themselves available for the trial in question. It also means that, after perhaps an interval of some days, they must resume hearing the evidence and pick up again the threads of the competing narratives being presented to them. More importantly in the present context, it means longer drawn out trials for witnesses,

64 Mirjan R. Damaska, *Evidence Law Adrift* (New Haven: Yale University Press, 1997), chap. 3.
65 *People (Attorney General) v McGlynn* [1967] I.R. 232.
66 *State (DPP) v Walsh* [1981] I.R. 412 at 438-439 (Henchy J.).

including victims. Any measures that can make the trial process more compact, without at the same time compromising its fairness, are therefore worthy of serious consideration.

5.4 The introduction of preliminary trial hearings in criminal proceedings has already been recommended in several reports. It was considered at some length by the Working Group on the Jurisdiction of the Courts (the Fennelly Report).[67] The Working Group recommended that a preliminary trial hearing be introduced in all cases on arraignment with following functions:

> "(1) to identify and determine whether the prosecution has made full disclosure in conformity with its current obligations;
>
> (2) to identify areas in which evidence should be agreed or admitted under the Criminal Justice Act 1984, section 21 (proof by written statement) and 22 (proof by formal admission), including admission of expert reports'
>
> (3) to identify any evidence which might require to be taken by video-link and to make arrangements for the taking of such evidence;
>
> (4) to ascertain any other arrangements, whether for information and communications technology, interpreters, or otherwise, which may require to be made at the trial;
>
> (5) to enable the determination of those types of issue of admissibility of evidence which by their nature are capable of being dealt with prior to trial;
>
> (6) to receive and deal with a plea or fix a hearing for sentencing;
>
> (7) to identify any issue of fitness to plead which may arise, and
>
> (8) to enable the court to establish the likely length of the trial."

This was not intended to be an exhaustive list of matters that might be determined at a preliminary trial hearing. The Working Group was of the view that such a system would:

> "serve as a means of concentrating the efforts of prosecution and accused in resolving those issues which it would be proper and feasible to finalise in advance of trial."[68]

It further recommended that co-operation by the accused at a preliminary trial hearing was a factor to which favourable consideration might be given at sentencing in the event of a conviction.

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67 Working Group on the Jurisdiction of the Courts, *The Criminal Jurisdiction of the Courts* Pn 237 (Dublin: The Stationery Office, 2003), paras 746 to 781.

68 Ibid, para. 776.

5.5 The introduction of preliminary trial hearings was also recommended by the Expert Group on Article 13 of the European Convention on Human Rights (the McDermott Report) and the Working Group to Identify and Report on Efficiencies in the Criminal Justice System.

5.6 The Department of Justice and Equality has already prepared the General Scheme for a new Criminal Procedure Bill, the most recent version dating from April 2015. Head 2 of the Scheme provides for "Preliminary Trial Hearings" in respect of trials on indictment in the Central Criminal Court, the Circuit Court and the Special Criminal Court. It envisages that such a preliminary hearing shall be part of the trial and that the accused shall be arraigned at the start of the hearing unless he or she has already been arraigned. Under the General Scheme, as it currently exists, it is envisaged that a preliminary hearing would deal with matters such as whether certain evidence should be admitted or excluded, whether an indictment should be severed and whether co-accused persons should be tried separately. It is accepted, however, that several other matters might also be dealt with at such a hearing.

5.7 The Working Group supports the general policy reflected in this proposed legislation. More detailed consideration may be required as to whether the judge presiding at a preliminary hearing should have jurisdiction to entertain an application to have the trial restrained or prohibited on a ground such as complainant or prosecution delay, prejudicial pre-trial publicity or lost evidence. As explained in Chapter 9, which deals with delay, applications for prohibition of trial on such grounds have, until now, been made by way of separate judicial review proceedings which may be initiated in the High Court only. The present practice admittedly has some drawbacks, the main one being that it creates some additional delay (though not as much as previously) within the overall trial process. Even if the application is ultimately unsuccessful, it may lead to an additional delay of a year or more, especially if there is an appeal by the losing party to the Court of Appeal. If the application ultimately succeeds, there will either be no trial or else a trial on a reduced number of charges.

5.8 The superior courts have by now developed a coherent set of general principles to govern decisions on applications for prohibition of trial based on factors such as delay. They have consistently held that the grant of prohibition by way of judicial review should be an exceptional remedy, given that the prosecution of offences is constitutionally assigned to the executive branch of government (and more specifically to the Director of Public Prosecutions).[69] Secondly, they have held that most problems arising from the grounds on which judicial review applications are based – most typically complainant or prosecution delay – can adequately be addressed at the trial itself.[70] They have stressed that trial judges have a constitutional duty to ensure that every accused person receives a fair trial and that, in the discharge of that duty, they are obliged to take whatever steps are necessary in terms giving appropriate instructions and warnings to the jury or, in an extreme case,

69 *D.C. v DPP* [2005] 4 I.R. 281; *Byrne v DPP* [2011] 1 I.R. 346.
70 *P.B. v DPP* [2013] IEHC 401.

bringing the trial to a halt.[71] They have, however, accepted that cases, rare though they may now be, will arise where an applicant succeeds in showing that he or she is at a real and unavoidable risk of an unfair trial, a risk that cannot realistically be neutralised by any directions a trial judge might give to a jury. The existence of these settled principles may militate in favour of retaining the present system for those cases, which are greatly diminishing in number, where an accused is seeking to have the trial prohibited entirely because of delay or some other factor. This is a matter on which the Department of Justice and Equality may wish to seek further views before coming to a decision on the matter.

5.9 Under the law as it stands, certain pleas in bar of indictment are entered in the trial court. This applies, for instance, to pleas of *autrefois convict* or *autrefois acquit* or a claim that the offence charged is not known to the law.[72] The Working Group does not recommend any change in this regard.

5.10 In so far as the trial of sexual offences is concerned, issues that might be determined at a preliminary trial hearing include, as already noted, matters relating to disclosure, the appointment and role of an intermediary, applications to question a victim under s. 3 of the 1981 Act, and any special measures required for vulnerable witnesses. The general policy should be that a preliminary hearing can resolve those issues which, in the words of the Working Group on the Jurisdiction of the Courts, are "proper and feasible to finalise in advance of trial."

5.11 Head 2 of that General Scheme for a Criminal Procedure Bill (mentioned in 5.6 above) currently proposes that a preliminary trial shall be part of the trial. This should mean, among other things, that a decision made at a preliminary trial may not be challenged by way of appeal until the trial has fully concluded. Were the law to provide otherwise, the introduction of preliminary trials might well be counterproductive because of the delay that would be occasioned by way of interlocutory appeals. The Working Group recommends that this aspect of the proposed law be retained.

5.12 As far as at all practicable, the preliminary hearing should be conducted by the judge who will preside at the trial, though we accept that this may not always be possible. However, we recommend that in every case, there be a written record of decisions taken and directions given at the trial hearing. This record should always be available to the trial judge.

5.13 In conclusion, we reiterate our strong support for the introduction of preliminary trial hearings along the lines proposed in the General Scheme for a Criminal Procedure Bill to which we have already referred. We appreciate that it requires further detailed consideration, but we recommend the introduction of legislation as soon as possible.

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71 *J.(S.)T. v President of Circuit Court* [2015] IESC 25.

72 *People (DPP) v P.O'C* [2006] 3 I.R. 238.

## Applications under section 3 of Criminal Law (Rape) Act 1981

5.14 The law relating to the questioning of victims about their sexual experience, in accordance with section 3 of the Criminal Law (Rape) Act 1981, will be considered further in Chapter 6 of this Report. At present, all such applications are made during the trial itself. A victim is entitled to be heard and to be separately legally represented during the hearing of such an application, and the Legal Aid Board is obliged to provide the victim with a legal representative, free of charge, for this purpose. The speed with which the Board must act, if the trial is not to be interrupted for an undesirably long period, means that it is not always possible to secure representation by counsel who has the same seniority or level of experience as those who are acting for the prosecution and the defence. For this reason alone, there is a strong case to be made for an application to question a victim about sexual experience to be either made or notified at a preliminary trial hearing.

5.15 Either of two models might be adopted for this purpose. Under the first, the defence would be required to *notify* the court at the preliminary hearing that an application would be made at trial to question the victim in accordance with section 3 of the 1981 Act. The court would not, at that point, adjudicate on the application, but it would order that steps be taken to ensure that (a) the victim was made aware that such an application would be made at trial and (b) that the Legal Aid Board was put on immediate notice of the proposed application so that it could provide the victim with an appropriately experienced counsel at the hearing of the application at trial. This would represent a significant improvement on the present situation.

5.16 Under the second model, the judge conducting the preliminary hearing would *hear and determine* an application under section 3 of the 1981 Act to question the victim about her or his sexual experience. The judge's decision on the matter would ordinarily be final. Given the overarching constitutional imperative that every accused person is entitled to a fair trial in accordance with law, it may not be possible to impose an absolute prohibition on the making of such an application during the trial itself, However, it should be feasible to provide by law that any such application must be made at a preliminary hearing and that it may not be made or renewed during the trial itself save in exceptional circumstances. An accused person who failed to make such an application at the preliminary hearing or whose application was unsuccessful at that point, and who wished to make or renew the application, as the case may be, during trial would be obliged to satisfy the trial judge that there were strong and compelling reasons why the application should then be entertained and, moreover, that refusal of leave to question the victim about her or his sexual experience would create a real risk of a miscarriage of justice.

5.17 Adoption of the second model might create a logistical complication. As already noted, a victim is entitled to be heard and legally represented at the hearing of an application under section 3 of the 1981 Act. This would continue to apply even if the application were made at a preliminary hearing rather than at the trial itself. The victim would still be entitled to an adequate opportunity to secure legal

representation meaning, in effect, that the Legal Aid Board would have to be given notice that such representation was needed. In these circumstances, two preliminary hearings rather than one might be needed, although this would not be impossible. Two or more preliminary hearings might be needed for a variety of reasons. However, this consideration, coupled with the likely reality that applications under section 3 of the 1981 Act might still, on occasion, be made and entertained during the trial itself, prompts the Working Group to recommend the first of these two models. It would still be of great benefit to victims to have advance notice that an application to engage in such questioning was to be made, and to have an experienced counsel of an appropriate level of seniority to represent them at the hearing of such applications during trial.

5.18 Irrespective of which model is adopted (and we recommend the first), an accused person who intends to make an application at the preliminary hearing in connection with s. 3 of the Criminal Law (Rape) Act 1981 should be required to furnish the Director of Public Prosecutions with notice of the proposed application a certain number of days (to be specified) in advance of the preliminary hearing.

## Appointment and functions of intermediaries

5.19 The role of intermediaries is discussed in some detail in Chapter 8. By the time a trial begins, an appropriate intermediary should have been appointed for any witness deemed to be in need of such assistance. As recommended in Chapter 8, it will be desirable in many cases to have an intermediary appointed at an earlier stage, especially to assist at the Garda questioning of vulnerable witnesses or suspects. However, if this has not already been done, an application for the appointment of an intermediary should be made, whether by the defence or prosecution, at a preliminary hearing. The judge conducting the hearing can invite submissions as to who would be the most suitable or best qualified intermediary, and about the role that the intermediary can most usefully play during the trial. Such an arrangement would allow for an appropriate intermediary to be identified, if one has not already been engaged, and to allow time for whatever preparations must be made to provide effective intermediary services to the relevant witness.

## Ensuring the case is ready for trial

5.20 Circumstances may arise where a trial, for unavoidable reasons, cannot begin on the appointed date or where it must be adjourned in order for some matter, such as disclosure (which will be considered in more detail in Chapter 6) to be addressed. Whatever the reason, adjournment of a trial, especially if it occurs at the last minute, can be very upsetting and stressful for witnesses and their families, and for victims in particular. This is especially true where, due to pressure on court lists, the adjournment must be for a significant period of time. A preliminary trial hearing could serve an important function in ensuring that both the prosecution and defence are satisfied that all necessary steps have been taken that will allow the trial to begin

on the scheduled date. Any outstanding issues relating, for example, to disclosure should be brought to the attention of the judge conducting the preliminary hearing so that a realistic assessment can be made as to whether such issues can be resolved by the scheduled hearing date.

## Other preliminary matters

5.21 We accept that other matters, including many of those identified in the Report of the Working Group on the Jurisdiction of the Courts and in the General Scheme of the Criminal Procedure Bill, are also suitable to be addressed and, as far as possible, resolved at a preliminary hearing. For instance, issues relating to the admissibility of evidence (where, for example, objection is made that evidence was obtained in breach of the accused person's constitutional rights) or the fitness of an accused to be tried might suitably be addressed, in some instances at least, at such a hearing.

## Concluding comments

5.22 As already stated, preliminary hearings have been recommended in a number of previous reports and we too fully support their introduction. They cannot be guaranteed to streamline the trial process to the extent of eliminating from the trial all matters that might conceivably have been addressed at an earlier stage. The accused person's right to a fair trial remains paramount, and the rights of victims and witnesses must always be respected as well. Hence, there will inevitably be cases where the trial judge will be called upon to decide on some matter that would ordinarily come within the ambit of a preliminary hearing. If all parties approach preliminary trial hearings in the right spirit, they should go a considerable distance towards abbreviating criminal trials and making the trial experience less stressful for vulnerable witnesses.

5.23 Certain incentives might be introduced to encourage parties to engage fully with preliminary trial hearings. As recommended by the Working Group on the Jurisdiction of the Courts, a defendant who co-operates in a meaningful way at a preliminary trial hearing may be eligible to receive some reward by way of a reduced sentence, if eventually convicted. It is, in any event, an existing principle of sentencing that co-operation with the investigation of an offence and with the trial process justifies some mitigation, the precise amount being at the discretion of the sentencing judge in light of the overall circumstances of the case. Secondly, lawyers (both solicitors and barristers) representing parties at preliminary trial hearings should be entitled to appropriate fees for doing so. The scale of fees payable by the Director of Public Prosecutions and under the free legal aid scheme should be revised to provide for this.

# SUMMARY OF RECOMMENDATIONS

- **Legislation should be introduced, along the lines proposed in the General Scheme for a Criminal Procedure Bill drawn up in 2015 by the Department of Justice and Equality, to provide for the establishment of preliminary trial hearings. We recommend the introduction of the necessary legislation as soon as possible.**

- **Without prejudice to the other matters that may be addressed at a preliminary hearing, any defence application to be made at trial to question a victim about his or her sexual experience under the terms of s. 3 of the Criminal Law (Rape) Act 1981 should be notified to the Court at that hearing, and the Legal Aid Board notified accordingly.**

- **Any issues relating to the appointment or role of an intermediary, and any other special measures required for vulnerable witnesses, should also be addressed at a preliminary trial hearing.**

- **There should be an obligation on both prosecution and defence to notify the judge conducting the preliminary trial hearing of any outstanding matters relating, for example, to disclosure that may prevent the trial from commencing on the scheduled date.**

- **Lawyers in private practice representing either the prosecution or the defence should be duly remunerated for their work in preparing for and attending preliminary trial hearings.**

# CHAPTER 6: THE TRIAL OF SEXUAL OFFENCES

6.1 This chapter deals with a selection of issues connected with the trial process. It does not purport to deal with all aspects of sexual offence trials; rather it is confined to matters that come within our Terms of Reference or are closely related to them. Disclosure, the final topic addressed in this chapter, arises primarily in advance of trial, but it is included here because of its relevance to the overall fairness of a trial. Further, disclosure may take place during, as well as before, the trial. Other trial-related issues, such as the use of intermediaries and the grant of anonymity to victims and defendants, are addressed in separate chapters of the Report.

6.2 Victims of sexual offences are sometimes surprised to discover that their role in the criminal trial is that of witness for the prosecution. Under our adversarial system of justice, there are only two parties in a criminal trial: the prosecution and the defence. There may be what Lord Steyn once described as a "triangulation of interests",[73] those of the accused, the State and the victim, but the trial remains essentially a contest between the prosecution and defence. This in turn underscores the importance of having structures in place to ensure that victims are well informed in advance as to how a criminal trial unfolds and the role that they can expect to play within it. Every accused person has a constitutional right to a fair trial, and trials must be so conducted as to ensure that this right is fully vindicated. Victims, however, have their own rights. Most notably, they have the right to be treated with fairness, dignity and respect. They should not in any circumstances be subjected to degrading or humiliating treatment. It is through the lens of this principle that we consider the issues addressed in this chapter, in order to ascertain if there are any further measures that might be adopted to enhance the fairness of the process from the victim's perspective without encroaching on the rights of the accused.

## QUESTIONING OF VICTIMS

6.3 One of the major objectives of those who campaigned for rape law reform in Ireland and elsewhere during the 1970s and 1980s was to secure legal restrictions on the extent to which victims in sexual offence trials could be questioned about their previous sexual experience. The freedom then accorded to defence lawyers to cross-examine victims about their sexual history and experience was undoubtedly a significant reason why rape and other sexual offences were greatly underreported. At that time, victims of sexual crime could justly complain that the trial process amounted to secondary victimisation. Here in Ireland, the Criminal Law (Rape) Act 1981 (s.3) provided that at a trial for a rape offence, except with the leave of the judge, no question should be asked by or on behalf of an accused "about any sexual experience of a complainant with a person other than the accused." This was largely based on a similar provision in the English Sexual Offences (Amendment) Act 1976. As a result of amendments made by the Criminal Law (Rape) (Amendment) Act 1990,

73 *Attorney General's Reference (No. 3 of 1999)* [2001] 2 A.C. 94 at 118.

the restriction on questioning now applies at trial for any sexual assault offence (which encompasses a wider range of specific offences than a "rape offence") and it extends to "any sexual experience" other than that to which the charge relates, with any person (and that includes the accused).

6.4 As the law now stands, therefore, at any trial for a sexual assault offence, except with the permission of the judge, no evidence shall be adduced and no question asked in cross-examination, by or on behalf of any accused person, about any sexual experience of the victim, other than that to which the trial relates, with any person. The judge may give permission only if an application is made by the defence in the absence of the jury. The basis on which the judge may grant leave is set out in s. 3(2)(b) of the 1981 Act as amended:

> "The judge shall give leave if, and only if, he is satisfied that it would be unfair to the accused person to refuse to allow the evidence to be adduced or the question to be asked, that is to say, if he is satisfied that, on the assumption that if the evidence or question was not allowed the jury might reasonably be satisfied beyond reasonable doubt that the accused person is guilty, the effect of allowing the evidence or question might reasonably be that they would not be so satisfied."

6.5 The same applies in any proceeding under Part IA of the Criminal Procedure Act 1967 (as inserted by the Criminal Justice Act 1999) for the dismissal of a charge of a sexual assault offence or for the taking of a person's evidence by way of deposition in such a case.[74] It also applies to other offences, including defilement offences contrary to the Criminal Law (Sexual Offences) Act 2006, as amended. A provision of this kind should apply to any offence the victim of which is liable to be questioned about other sexual experience.

6.6 As the Court of Appeal has recently said in *People (DPP) v E.H.,*[75] "[t]he statutory threshold [under s. 3(2)(b) of the 1981 Act] is… a high one, though we hasten to add not an impossible or unattainable one." Previously, in *People (DPP) v G.K.*[76] the Court of Criminal Appeal had said:

> "Having regard to the severely restrictive terminology of the statutory provision, the Court is of the view that, in general, a decision to refuse to allow cross-examination as to past sexual history may be more readily justified in most cases than the converse. Indeed, the Act is quite explicit in so providing. Furthermore, the younger the age of a complainant, the less desirable it is ever to allow cross-examination which may well be extremely traumatic for a complainant of tender years. Where a form of questioning is allowed, it should be confined only to what is strictly necessary and should never be utilised as a form of character assassination of a complainant."

74 Criminal Law (Rape) Act 1981, s.4 as substituted by the Criminal Justice Act 1999, s. 15.
75 [2019] IECA 30.
76 [2007] 2 I.R. 92 at 103-104.

Any statutory provision restricting the questioning of victims about their sexual history must attempt to strike a balance between ensuring a fair trial for the accused and respecting the victim's rights to personal privacy and human dignity. An outright ban on such questioning could create the risk of an occasional miscarriage of justice and would therefore be unacceptable. But it is equally important that such questioning, when permitted, should not amount to a gratuitous exercise of prying into the personal life of a witness in order to discredit her or him in the eyes of the jury, or to become, in the words of the Court of Criminal Appeal in *G.K,* a form of character assassination. In *R v Seaboyer*[77] the Canadian Supreme Court struck down a statutory provision that prohibited the defence from adducing any evidence concerning the sexual activity of a victim with any person other than the accused except in three narrowly defined sets of circumstances. Writing for the majority of the Court, McLachlin J. (as she then was) said:

> "It is fundamental to our system of justice that the rules of evidence should permit the judge and jury to get at the truth and properly determine the question… In general, nothing is to be received which is not logically probative of some matter requiring to be proved and everything which is probative should be received, unless its exclusion can be justified on some other ground. A law which prevents the trier of fact from getting at the truth by excluding relevant evidence in the absence of a clear ground of policy or law justifying the exclusion runs afoul of our fundamental conception of justice and what constitutes a fair trial."

The same considerations undoubtedly apply under our constitutional system. A fair balance must be struck between the accused person's right to a fair trial and the need to shield the victim from any kind of humiliating or degrading treatment while being questioned.[78]

6.7 The grant of leave pursuant to s. 3(2)(b) of the Criminal Law (Rape) Act 1981 does not mean that defence lawyers are entitled to ask any questions they like in respect of the victim's sexual experience. Even after granting leave, the judge may disallow a question if he or she takes the view that it may not properly be asked in accordance with the leave given. If such a question has already been asked, the judge may direct that it shall not be answered except in accordance with leave given on a fresh application under the section. It is clear therefore that the trial judge has a crucial role in ensuring that, throughout the trial, any evidence adduced or questions asked regarding the victim's sexual experience conform strictly with the statutory criteria set out in s. 3(2)(b).

6.8 The Working Group takes the view that the terms of s. 3 of the 1981 Act strike a fair balance between protecting the rights of accused persons and those of victims in sexual offence trials, and it does not recommend any change to the section.

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77 [1991] 2 S.C.R. 577.

78 The need for such balance was also recognised by the House of Lords in *A (No.2)* [2001] UKHL25. See Nick Dent and Sandra Paul, "In defence of section 41" [2017] Crim. L.R. 613; Laura Hoyano, *The Operation of YJCEA 1999, section 41 in the Courts of England and Wales: Views from the Barristers' Row. An independent empirical study commissioned by the Criminal Bar Association* (2018), available at www.criminalbar.com.

6.9 Independently of s. 3 of the 1981 Act, the Criminal Justice (Victims of Crime) Act 2017 provides further protection for crime victims who are being questioned in the course of criminal proceedings. Section 21 of the 2017 Act provides:

> "In any proceedings relating to an offence, where a court is satisfied that –
>
> (a) The nature or circumstances of the case are such that there is a need to protect a victim of the offence from secondary and repeat victimisation, intimidation or retaliation, and
> (b) It would not be contrary to the interests of justice in the case,
>
> the court may give such directions as it considers just and proper regarding any evidence adduced or sought to be adduced and any question asked in cross examination at the trial which relates to the private life of the victim and is unrelated to the offence."

While this applies to proceedings in respect of any criminal offence, it has particular relevance to sexual offence trials where questions about a victim's private life are most likely to be asked. Further the section places the onus firmly on the trial judge to protect a victim from repeat and secondary victimisation, intimidation or retaliation. This measure (which gives effect to Art. 18 of the EU Victims of Crime Directive, 2012/29/EU) is to be welcomed, and we recommend that all necessary steps be taken to ensure that judges and lawyers are familiar with it. It should be included in the training programmes that we recommend in Chapter 10.

## LEGAL REPRESENTATION FOR VICTIMS

### The present law

6.10 As a result of a statutory provision introduced under the Sex Offenders Act 2001, victims in certain sexual offence trials are entitled to separate legal representation in respect of any application that is made to question them about their sexual experience.[79] Where such an application is made, the victim is entitled to be heard and, for this purpose, to be legally represented during the hearing of the application. The prosecution must notify the victim of these entitlements as soon as it is notified of the application. The trial judge must also be satisfied that the victim has been so notified before proceeding to hear the application. The victim must be afforded reasonable opportunity to secure legal representation and the trial may, if necessary, be adjourned to enable this to happen. Importantly, for present purpose, the relevant section also provides:

> "Notice of intention to make an application under section 3 or 4 [to question the complainant about sexual experience] shall be given to the prosecution by or on

[79] Criminal Law (Rape) Act 1981, s.4A inserted by the Sex Offenders Act 2001, s. 34.

> behalf of the accused person before, or as soon as practicable after, the commencement of the trial for the offence concerned or, as the case may be, the commencement of the proceeding concerned referred to in section 4(1)."[80]

Separate legal representation is available at a trial for a rape offence, an offence under the Criminal Law (Sexual Offences) Act 2006, an offence under s. 6 of the Criminal Law (Sexual Offences) Act 1993, aggravated sexual assault and associated offences (e.g. attempted aggravated sexual assault, aiding, abetting, etc.). It does not extend to trial for "sexual assault offences" which would include sexual assaults. The Working Group recommends that the provision for separate legal representation (and the associated right to legal aid) should extend to all trials for sexual assault offences. The experience of a victim as witness in a trial for sexual assault may be no less difficult or traumatic than in a trial for a rape or aggravated sexual assault offence.

6.11 Another positive element of the scheme introduced under the 2001 Act is that it provides for legal aid to be granted to a complainant for the purpose of securing separate representation. The Civil Legal Aid Act 1995 (s. 28(5A)) was amended to provide that the Legal Aid Board "shall grant a legal aid certificate to a complainant for the purpose of his or her being represented in relation to an application referred to in section 4A of the Criminal Law (Rape) Act 1981, that concerns him or her." However, the manner in which this system operates was the subject of some comment during our consultations. As the law stands, in a sexual offence trial, the prosecution is represented by counsel who are briefed by the Director of Public Prosecutions. The defence will have briefed its own counsel who, in many instances, will be remunerated under the criminal legal aid scheme. However, a complainant who is granted separate legal representation will be represented by counsel briefed by the Legal Aid Board. As already noted, such representation is not currently available or legally aided at the trial of a sexual assault offence.

6.12 One problem encountered by the Legal Aid Board (with representatives of which the Working Group had a very helpful meeting) is that it generally receives very little notice that a counsel is required in such a case. This is because the application to cross-examine the victim about her or his sexual experience is often not made until the trial is in progress or immediately before it begins. Naturally, it is desirable that any adjournment that is ordered for this purpose should be for the shortest possible time. Save in exceptional circumstances, once a trial begins, especially if it is being held before a jury, it should proceed to a conclusion without interruption. It is also in the interests of all concerned that a trial should begin on the scheduled date, if at all possible, rather than being adjourned (because of the inconvenience this may cause to all concerned, including witnesses). In these circumstances, it is understandable that the Legal Aid Board must act quickly once it is notified that a barrister is needed.

6.13 It appears that the barrister briefed by the Legal Aid Board in these circumstances is almost invariably a junior counsel. At the trial of a sexual offence of any appreciable degree of gravity both prosecution and defence will almost always be represented by experienced senior as well as junior counsel. There is consequently some imbalance

80 Criminal Law (Rape) Act 1981, s. 4A(2).

in the level of representation enjoyed by the defence and prosecution on the one hand and by the victim on the other. It should be stressed that, according to information received by the Working Group, junior counsel briefed by the Legal Aid Board for this purpose always perform their duties professionally and conscientiously. There can, of course, be no guarantee that the person briefed will have much experience as a trial lawyer in serious sex offence cases. Moreover, that person will have to familiarise himself or herself very quickly with the background to the case. The defence and prosecution lawyers, by contrast, will have had considerable time and opportunity to prepare for the trial. One reason why junior counsel only are briefed in these circumstances is that, given the speed with which the brief must be allocated, it is often difficult to secure the services of an experienced senior counsel at such short notice.

6.14 This state of affairs provides another compelling argument for a system of preliminary trial hearings at which certain preliminary matters can be raised and determined. It is therefore recommended that when such a system is introduced, the defence should be required at that point to notify the court if it intends to make an application under s. 3 of the Criminal Law (Rape) Act 1981 to question the victim about her or his sexual experience. Ordinarily, a failure by the defence to give such notification during the preliminary trial hearing that it intended to make such an application should preclude it from making the application during the trial. The Working Group would not recommend an absolute rule to this effect, as evidence or information might come to light after the trial began which would justify the making of an application under s. 3. However, in such an eventuality, the defence would have to satisfy the trial court that there were good and sufficient reasons for not having notified the court of its intended application at the preliminary trial hearing. One advantage of this proposed arrangement is that the Legal Aid Board would be in a better position to select counsel of an appropriate level of seniority and experience in light of the nature of the case.

6.15 Another aspect of the system of separate legal representation for victims which calls for some consideration is that the law, as it now stands, permits such representation only for hearing of an application under s. 3 of the 1981 Act to cross-examine a victim. If the application is granted, and the questioning proceeds, the victim's legal representative has no role in that regard. Yet, as some of our consultees recommended, a victim could also benefit from having legal representation throughout the cross-examination if it is allowed to proceed. As already noted, the judge is required to be vigilant as to how the cross-examination is conducted. If a question being asked may not properly be asked in accordance with the leave that was given, the judge may direct that the question shall not be asked or, if asked, shall not be answered except in accordance with any leave given under a fresh application. It would surely be helpful to the trial judge and, of course, to the victim if the counsel assigned by the Legal Aid Board, who usually remains in court during the cross-examination, were allowed to object to a question or, at least, submit to the trial judge that a particular question did not come within the terms of the leave that was given. The Working Group recommends that, when an opportunity arises, the law should be reformed to confer this additional role on the victim's representative.

## Separate legal representation for victims throughout the trial

6.16 There have been occasional suggestions that victims in sexual offence cases should be entitled to separate legal representation throughout the entire trial, irrespective of whether any application is made to question them about their sexual history or experience. This question was broached during our consultations, and it is fair to say that while some consultees might have favoured such an innovation, none of them urged us very strongly to recommend its introduction. The Working Group has nonetheless considered this suggestion and has concluded that it would not recommend separate legal representation throughout the trial for victims in sexual offence cases. It has reached this conclusion for a number of reasons. First, as noted at the beginning of this Chapter, the criminal trial is essentially a binary contest between the prosecution and defence. The procedural and evidential rules, which have evolved over time, are based on that assumption. As noted in Chapter 2 above, under both the Constitution of Ireland and the European Convention on Human Rights, there must be equality of arms, in so far as that can be achieved, between the accused and the prosecution. This does not, of course, prevent every reasonable consideration being accorded to witnesses, and victims in particular, who testify at trial. The introduction of separate legal representation for one category of witness throughout the entire trial would risk upsetting that well-established balance.

6.17 Further, arguments in favour of granting victims separate legal representation throughout the entire trial often fail to acknowledge the prosecutor's role in protecting victims' interests. Granted, the primary role of the prosecution is to prosecute offences in the name of the People (in the words of Article 30 of the Constitution). This reflects the well-accepted reality that a crime is a wrong against the community as well as against the particular victim where there is an identifiable one. The role of the prosecutor is that of "minister of justice" meaning that he or she must place before the court all the evidence suggestive of the accused person's guilt and it must, of course, do so as effectively as possible. But a prosecutor must never act in a way that will prevent the accused person from getting a fair trial.[81] A lawyer appointed to represent the victim or any other witness during trial would obviously be subject to the same ethical and professional standards as any other. Having said all of this, prosecuting counsel must, and invariably do, show every consideration to victims. They cannot, of course, engage in any communication that might amount to coaching the victim or any other witness.[82] The same restriction would apply to any lawyer directly representing a victim. As noted in Chapter 7 below, the Office of the Director of Public Prosecutions, in collaboration with An Garda Síochána, operates a witness familiarisation programme for victims (and their families) in serious sexual offence cases. This usually includes a courtroom visit prior to the trial. Secondly, pre-trial meetings are offered with counsel and solicitor for the prosecution who may also confer with the victim and keep her or him informed of what is happening throughout the trial. This, in fact, routinely occurs.

81 *Director of Public Prosecutions v Special Criminal Court* [1999] 1 I.R. 60.

82 See Chapter 7 below.

6.18 Additionally, our recommendations in Chapter 7 regarding the provision of information and advice for victims at different stages in the criminal process should, if implemented, result in victims being well informed about the trial process and their role within it. As also mentioned in that Chapter, victims have the opportunity, in some court venues, to be accompanied in court by trained volunteers who are very familiar with the trial process and who can respond to any questions victims may have in connection with it. We are recommending that steps be taken to ensure that this service, or something equivalent to it, is available to victims in all sexual offence trials wherever they take place.

## PROHIBITION OF CROSS-EXAMINATION OF VICTIMS BY DEFENDANTS IN PERSON

6.19 Under s. 14C of the Criminal Evidence Act 1992, as inserted by the Criminal Law (Sexual Offences) Act 2017, an accused person may not personally cross-examine a witness who is under 18 years of age or a victim of any age in a sexual offence case. The prohibition is not absolute in the sense the court shall prohibit such cross-examination in person unless it is "of opinion that the interests of justice require the accused to conduct the cross-examination in person." This new section also provides that where the accused is prohibited from conducting a cross-examination in person the court must allow him or her an opportunity to secure legal representation. If, for whatever reason, no such representation is obtained, the court may, if it considers it in the interests of justice to do so, select and appoint a legal representative to conduct the cross-examination. Where an accused person is prevented from conducting a cross-examination of a witness in person pursuant to s. 14C, the Legal Aid Board shall grant a legal aid certificate to the accused for the purpose of being represented.[83]

6.20 The Working Group welcomes this provision. It is aware that in England and Wales where a similar provision was introduced in 1991[84] cases occurred where victims were seriously traumatised as a result of being cross-examined in a deliberately humiliating manner by accused persons. Section 14C of the Criminal Evidence Act 1992 should prevent similar conduct occurring in this jurisdiction. It also strikes a fair balance between the interests of the accused and the victim by ensuring that an unrepresented defendant is entitled to representation, free of charge, for the purpose of conducting any necessary cross-examination. We should, however, record that, to be best of our knowledge, it rare in the extreme for an accused in a sexual offence trial to be self-represented.

83 Civil Legal Aid Act 1995, s. 5A inserted by Criminal Law (Sexual Offences) Act 2017, s. 40.
84 Criminal Justice Act 1988, s. 34A inserted by Criminal Justice Act 1991, s. 55(7).

## PRE-RECORDED EXAMINATION-IN-CHIEF, CROSS-EXAMINATION AND RE-EXAMINATION

6.21 In England and Wales, the Youth Justice and Criminal Evidence Act 1999 (s.27) provides for a video recording of a witness interview to be admitted as evidence in chief. This may be done only where there is a special measures direction in place. Interviews conducted for this purpose must comply with the guidelines in the Home Office paper, *Achieving Best Evidence in Criminal Proceedings*: *Guidance on Interviewing Victims and Witnesses, and Guidance on Using Special Measures* (March 2011). Interviews are usually conducted by police officers specially trained for that purpose and are known as ABE interviews. *Murphy on Evidence* states:

> "Invariably now, pre-recorded interviews with vulnerable or young witnesses form the examination in chief of that witness."[85]

However, a pre-recorded interview will not be admitted in evidence if the court is of the opinion that, in the interests of justice (including possible prejudice to the accused), the recording, or part of it, should not be admitted.

6.22 The English Act of 1999 (s. 28) also provides (again where there is a special measures direction in place) for the admission of a video recording of the cross-examination and re-examination of a witness. Such a recording must be made in the absence of the accused but in circumstances where the accused is able to see and hear the examination and communicate with any legal representatives acting for him or her. Section 28 has not yet been brought into force generally, though it has been brought into operation on a very limited basis in order to be piloted in specified Crown Courts.

6.23 In this jurisdiction, the Criminal Evidence Act 1992 (s. 16) provides that (1) a video recording of any evidence in relation to a sexual offence (or certain other offences) through a live television link in proceedings under Part 1A of the Criminal Procedure Act 1967, (2) a video recording of any statement made during an interview with a member of An Garda Síochána by a person under 18 years of age in relation to an offence of which he or she is the victim; and (3) a video recording of any statement made during an interview with a member of An Garda Síochána by a person under the age of 18 years, other than the accused, in relation to a sexual offence, a child trafficking, child pornography or human trafficking offence, shall be admissible at trial as evidence of any fact stated therein of which direct oral evidence would be admissible. Such a recording shall not be so admissible unless the person whose statement was video recorded is available at trial for cross-examination. Further such a recording or any part of it shall not be admitted if the court is of the opinion that its admission would not be in the interests of justice. Section 16 does not directly state that such a recorded statement is to be treated as evidence in chief, though it is likely that in practice it may be so treated. As noted earlier in Chapter 3, the special interview suites that have been established in various locations throughout the

85 Richard Glover, *Murphy on Evidence,* 15th ed (Oxford University Press, 2017), p 234. See also *Phipson on Evidence,* 19th ed. (London: Sweet and Maxwell, 2017), pp. 324-329.

country, are equipped to record such interviews for later use at trial. We support this practice and reiterate our earlier recommendation that the number and geographical distribution of such units be kept under review to ensure all victims who qualify for such special measures have reasonable access to them.

6.24 We have considered the question of whether pre-recorded cross-examination and re-examination should also be admissible at trial, as envisaged by s. 28 of the Youth Justice and Criminal Evidence Act 1999 in England and Wales. We can see some merit in such a development, but we are conscious of one underlying problem which has also been identified by commentators on the English provision.[86] A defence lawyer cannot be expected to conduct an effective cross-examination unless full disclosure has been made by the prosecution. As discussed further below, disclosure, by virtue of its sheer volume as much as anything else, is becoming increasingly problematic. Completion of disclosure can be delayed in sexual offence prosecutions because relevant material must be sought from other agencies and bodies. As discussed elsewhere in the report, the burden of evaluating increasing volumes of electronic data retrieved from phones and other devices for relevance and redacting irrelevant personal information to protect privacy is placing a significant burden on the prosecution. Disclosure may come in tranches, right up to the beginning of the trial and sometimes, indeed, after the trial has begun. We hope that our recommendations in relation to disclosure will help to expedite the process.

6.25 Accordingly, for a number of reasons, including the issue just mentioned in connection with disclosure, we do not recommend at this point that pre-recorded cross-examination or re-examination be introduced. We are also conscious of a number of other potential problems that were mentioned by the Bar Council in its submission to the Working Group. These include possible issues with technology, a potential reduction in the jury's ability to "read" a witness's body language, whether video testimony might create emotional distance between the witness and the jury, and possibly lack the immediacy and persuasiveness of live testimony. We do, however, acknowledge that strong arguments have been made, by academic experts and others, in favour of introducing such a practice[87]. Our recommendation is based solely on practical considerations rather than any opposition in principle. If the point is reached where these practical issues can be effectively addressed, pre-recorded cross-examination and re-examination may well become feasible, though any potential constitutional impediments would need to be carefully examined before a final decision is taken on the matter.

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[86] Richard Glover, *Murphy on Evidence,* 15th ed. (Oxford University Press, 2017, p. 238.

[87] See, for example, Laura Hoyano, "Video and live-link evidence: State of play" (October 2018) Counsel, 2-3; Alan Cusack, "Addressing vulnerability in Ireland's criminal justice system: A survey of recent statutory developments" (2020) International Journal of Evidence & Proof (forthcoming).

## EVIDENCE OF RECENT COMPLAINT

6.26 The law relating to evidence of recent complaint does not come directly within our Terms of Reference but, since it was raised by one or two of our consultees, we deal with it briefly here. As a general rule, a witness may not seek to prove that he or she previously made a statement which is similar in content to the testimony he or she is giving in court. One longstanding exception to that rule is that in a trial for a sexual offence, evidence may be given that the victim made a complaint shortly after the commission of the alleged offence. The primary purpose of such evidence is to show that his or her conduct at the time is consistent with the evidence he or she is now giving. This must be clearly explained to the jury. As the Court of Criminal Appeal said in *People (DPP) v M.A.*:

> "Where evidence of a complaint made by a complainant to third parties in the absence of the accused is admitted in a trial of a sexual offence to establish the consistency of the complaint with the evidence of the complainant, the purpose of the evidence should be explained to the jury and it should be made clear to it that such evidence is not evidence of the facts on which the complaint is based but may be considered by them as showing that the victim's conduct in so complaining was consistent with her testimony. It should also be explained to the jury that such evidence does not constitute corroboration, in the legal sense of the term, of the evidence of the complainant.[88]

It should be emphasised that evidence of recent complaint is not in any way essential for securing a conviction. Even in the absence of such evidence, the jury may be convinced beyond a reasonable doubt of the guilt of the accused. The origins of this rule may lie in the ancient law that required a victim of rape to have raised "the hue and cry" before her complaint could be deemed credible.[89] Today, the rule operates largely in ease of victims of sexual offences to the extent that it allows them, in some cases at least, to establish consistency between their conduct in the aftermath of the offence and the evidence they are giving at trial. Further, at one time, such evidence was not admissible unless the complaint had been made to somebody in the immediate aftermath of the offence. Nowadays, courts are willing to admit a complaint made at the first reasonable opportunity, and this in turn is to be assessed by reference to all the relevant circumstances. It may well be that some aspects of the rule could usefully be reviewed, and we understand that it will, in fact, be considered by the Law Reform Commission in its project on the consolidation and reform of the law relating to sexual offences. However, we have not been presented with any convincing argument in favour of abolishing the rule, and we recommend that it be retained.

88 [2002] 2 I.R. 601 at 611.

89 Thomas O'Malley, *Sexual Offences,* 2nd ed. (Dublin: Round Hall, 2013), Chap. 21.

## DISCLOSURE

6.27 Several of our consultees raised issues connected with disclosure. Before addressing these, it may be useful to consider disclosure more generally as a key element of a fair trial as guaranteed by the Constitution. Under our common-law, adversarial system of criminal justice, the investigation of alleged offences is committed to the executive branch of government, essentially to An Garda Síochána. Unlike the procedures followed in some civil law jurisdictions, there is no ongoing judicial supervision of the investigation of offences and the collection of evidence. In our system, An Garda Síochána have significant powers and resources to collect evidence and obtain statements from potential witnesses. As a matter of fundamental fairness, therefore, the defence should have advance notice of the evidence on which the prosecution intends to rely at trial and, further, to have sight of any other material within the possession of the prosecution that might weaken its case or strengthen the defence case. After all, the role of the prosecution is not to secure a conviction at all costs, but rather to present its evidence fairly and effectively to the court. The defence, for its part, is entitled to expose any weaknesses in the prosecution case, in addition to putting forward any defences at its disposal.

6.28 An effective disclosure regime is therefore essential for a fair trial and, moreover, for a prompt trial, a matter of particular concern to many victims. As the Chief Inspector of the Crown Prosecution Service in England and Wales has recently stated:

> "Poor handling of disclosure undermines the principles of a fair trial, which is the foundation of our system. It adds delay and costs and increases the stress faced by witnesses, victims and defendants. It may result in a complete failure of proper process, either by stopping a trial from going ahead, thereby depriving the victim of justice, or by convicting an innocent defendant. Both amount to miscarriages of justice."[90]

While we acknowledge that Ireland has a generally effective system, we believe the Chief Inspector's remarks are apt in terms of underlining the importance of maintaining an effective disclosure regime, and improving it whenever necessary.

6.29 Advance disclosure of all relevant material by the prosecution to the defence is therefore essential for ensuring "equality of arms" between the defence and the prosecution. The principles governing disclosure and the values underpinning them are well recognised throughout the common-law world and, indeed, by the European Court of Human Rights.[91] The essence of those principles was recently summarised by the Supreme Court as follows:

> "The prosecution is obliged to give notice of the evidence that it intends to call at trial. As described by the Court of Criminal Appeal in *DPP v Farrell* [2014] IECCA

[90] HM Crown Prosecution Inspectorate, *Disclosure of Unused Material in the Crown Court* (London, 2020), Para. 1.1.

[91] See, for example, *Edwards v United Kingdom* (1992) 15 E.H.R.R. 417.

> 37, the purpose of giving notice of the evidence to be deployed against an accused is to give him a fair opportunity of answering it, not by mere bare denial but by evidence of his own or by cross-examination of the witness making the allegation. It is for that reason that prior notice is described as an essential aspect of a fair trial. The right to a fair trial is, of course, a fundamental right protected by article 38.1 of the Constitution.
>
> The prosecution is further obliged to make disclosure of all material in its possession that might undermine its own case or strengthen the defence. These two principles are, therefore, complementary in that notice is required for evidence intended to be used, while disclosure is required in respect of relevant unused material that might assist the defence."[92]

6.30 As the Supreme Court further noted, the prosecution obligation to serve notice of the evidence intended to be adduced at trial has been a fundamental element of our criminal procedure for over 150 years.[93] Nowadays, it is given effect by serving on the accused what is commonly known as the Book of Evidence which includes a list of witnesses it is proposed to call at trial, a statement of the evidence to be given by them and a list of exhibits. The necessity for such notice was not called into question by any of our consultees, and it is fully recognised as an essential component of a fair trial. Concerns have centred on the disclosure of material which may contain highly personal information relating to the victim in a sexual offence trial.

6.31 Disclosure by the prosecution to the defence is also required under European Union law. Directive 2012/13/EU sets out the minimum requirements in this regard, while accepting that member states may go further in protecting defence rights. Article 7(1) and (2) of the Directive state:

> (1) Where a person is arrested and detained at any stage of the criminal proceedings, Member States shall ensure that documents related to the specific case in the possession of the competent authorities which are essential to challenging effectively, in accordance with national law, the lawfulness of the arrest or detention, are made available to arrested persons or to their lawyers.
>
> (2) Member States shall ensure that access is granted at least to all material evidence in the possession of the competent authorities, whether for or against suspects or accused persons, to those persons or their lawyers in order to safeguard the fairness of the proceedings and to prepare the defence."

Paragraph (31) of the Preamble to the Directive states:

> "For the purpose of this Directive, access to the material evidence, as defined in national law, whether for or against the suspect or accused person, which is in the possession of the competent authorities in relation to the specific criminal case, should include access to materials such as documents, and where appropriate

92 *People (DPP) v O'Sullivan* [2018] IESC 15, paras 4 and 5.
93 [2018] IESC 15, para. 30.

photographs and audio and video recordings. Such material may be contained in a case file or otherwise held by competent authorities in any appropriate way in accordance with national law."

This Directive has not yet been formally transposed into Irish law, but in practice it is being given effect by the Director of Public Prosecutions.

6.32 The disclosure about which concerns have been expressed falls into two broad categories: (1) disclosure of counselling records, and (2) more general disclosure, which is not unique to sexual offence trials, of telephone records, social media usage and similar material. We shall deal with these in turn.

## Disclosure of counselling records

6.33 Disclosure of counselling records has been the subject of concern in many jurisdictions. Victims will very often have undergone counselling or therapy in the aftermath of the offence, and they may also have obtained medical treatment. In a case of so-called historic abuse, where there has been a long interval between the commission of alleged offences and the formal reporting of them, a victim may have had counselling over a significant period of time, or the counselling may have been obtained quite some time before criminal proceedings were instituted. In these circumstances, a tension can easily arise between two important sets of rights. On the one hand, a victim, like any person who seeks medical assistance, counselling or therapy, has an undoubted right to personal privacy, and that includes having their medical and counselling records kept confidential. Those records, after all, may contain highly personal information. On the other hand, the accused has a right to a fair trial and that, as already noted, entails a right to disclosure of any material that may strengthen his case or weaken that of the prosecution. Counselling records might well contain such material. They may not be within the prosecution's actual possession at the outset of the proceedings, but the duty of disclosure extends to material which is within the possession or power of procurement of the prosecution.

6.34 The challenge therefore is to strike an appropriate balance between ensuring an accused person's right to a fair trial and the victim's right to personal privacy in respect of counselling records. This issue has, in fact, been addressed by the Criminal Law (Sexual Offences) Act 2017, s. 39 which inserted a new s. 19A into the Criminal Evidence Act 1992. Section 19A, which entered into force on 30 May 2018, permits an accused person (or, in certain circumstances, the prosecutor) to make an application to the trial court for the disclosure of counselling records, and it sets out the criteria according to which the court should reach a decision on the matter.

6.35 In any criminal proceedings for a sexual offence, the prosecutor must notify the accused of the *existence* of any counselling records but shall not disclose those records without leave of the court. A victim or witness may expressly consent to the disclosure of the records, in which case the terms of s. 19A do not apply. In practice,

as we shall see, voluntary disclosure of this nature is made subject to strict conditions.

6.36 However, in any case where the matter falls to be determined by the trial court, an accused person must apply in writing for disclosure and, in so doing, state the grounds on which it claimed that the record is likely to be relevant to the trial. Where no such application is made by the accused, but the prosecutor believes that it is in the interests of justice that a record should be disclosed, the prosecutor may make an application for disclosure to the court, having notified the holder of the record, the victim, the accused and any other relevant person. Once an application is made, whether by the defence or the prosecution, the court must hold a hearing to determine if disclosure should be made. The holder of the record must produce it at the hearing and is also entitled to be heard in relation to the matter, as is the victim and any other person to whom the record relates.

6.37 Section 19A sets out in detail the factors to which the court must have regard when making a determination on the matter, but essentially the court *must* order disclosure of the content of the record "where there would be a real risk of an unfair trial in the absence of such disclosure." It *may* order disclosure where "where it is in the interests of justice to do so."[94] Even where a court orders disclosure, it may impose any condition it considers necessary in the interests of justice and to protect the privacy of any person (including, of course, the victim). A non-exhaustive list of possible conditions is included in s. 19A. These include a condition that part of the record be redacted, that the record not be disclosed to any other person without leave of the court, that no copies be made of it, that the record be viewed only at the offices of the court, that the record be returned to the holder, and that it be used solely for the purpose of the criminal proceedings.

6.38 A victim or witness is entitled, not only be heard, but to be legally represented at a disclosure hearing and is entitled to have a solicitor or barrister engaged by the Legal Aid Board to act on their behalf.

6.39 Section 19A has been in force for just over two years, but it appears to have been seldom used. In fact, the Working Group was informed that there has so far been only one application to the Central Criminal Court and a very small number of applications in the Circuit Court for disclosure under the terms of the section. It seems to remain the norm for victims and other witnesses to waive their right to a court hearing and to consent to the disclosure of counselling records. However, it bears mentioning in this regard that the Office of the Director of Public Prosecutions imposes strict conditions on the disclosure of such records, even where there has been a waiver. It requires undertakings from defence solicitors as to how the records will be held and used. For instance, the records may not be copied or distributed to anybody else, they may be consulted only in certain settings, and they must all be returned to the Director at the conclusion of the proceedings.

94 Section 19A(11)(a) and (b).

6.40 Nonetheless, the Working Group finds it a cause of concern that s. 19A, which was clearly intended to protect the privacy of victims in respect of their counselling records, is being so seldom used. It may well be that the existence and terms of the section are not as widely known as they should be. Steps should therefore be taken to ensure that all victims are fully aware of their rights in this regard. As the section makes clear, records should be disclosed, whether in redacted form or subject to other conditions, where this is necessary to counteract the real risk of an unfair trial. But it is equally important that information contained in such records, including information that may have no relevance to the matters to be determined at trial, should not be used in an inappropriate way or to embarrass or degrade a victim or witness in any way. The Working Group is satisfied, however, that section 19A, when implemented in the right spirit, strikes a reasonable balance between the constitutional entitlement of an accused person to a fair trial and the victim's right to personal privacy. It provides for an objective, independent assessment of disclosure applications with due regard to the competing rights and interests at stake. Our main concern is that it seems to be seldom used.

## Positive obligation on statutory bodies to furnish counselling records promptly

6.41 Criminal trials can be delayed, sometimes for significant periods of time, unless there is prompt disclosure of relevant material, including counselling records. We are aware that statutory bodies sometimes fail to furnish such records in a timely manner. We recommend that there should be a positive obligation, imposed by statute if necessary, on all public bodies, voluntary organisations and independent counsellors with custody of counselling records the disclosure of which is sought to furnish them to the Director of Public Prosecutions without delay.

## Disclosure of medical records

6.42 Section 19A of the Criminal Evidence Act 1992 applies solely to counselling records. A counselling record is defined as:

> "any record, or part of a record, made by any means, by a competent person in connection with the provision of counselling to a person in respect of whom a sexual offence is alleged to have been committed ('the complainant'), which the prosecution has had sight of, or about which the prosecution has knowledge, and in relation to which there is a reasonable expectation of privacy."

Medical records do not come within this definition. They are subject to the ordinary rules of disclosure, even though they may include information in respect of which there is also a reasonable expectation of privacy. We therefore recommend that in any future general review of the law relating to sexual offences, such as that being undertaken by the Law Reform Commission, consideration should be given to the question of whether the disclosure of medical records should be subject to a set of rules similar to those now governing counselling records.

## General disclosure (electronic data)

6.43 We now move on to a topic that has been of most concern to many of our consultees, and this relates to the disclosure of a victim's communications, whether by telephone, text messaging, emails or through the social media, before or after the commission of the alleged offence. Some of these communications may be relevant at trial, though not invariably so. However, in many cases, the sheer volume of them can be highly problematic, a factor that compounds the difficulty in deciding which of them, if any, should be disclosed to the defence. Developments in mobile and internet technology have produced a situation in which police investigators may be in a position to retrieve thousands of messages and communications between, for example, the victim and the accused, or between either of them and a third party. Other material may be gathered about, for example, a person's use of internet dating sites. This imposes a significant burden on the Gardaí in their investigation of a complaint, on the Office of the Director of Public Prosecutions in examining the content of the communications and deciding on the extent to which they should be disclosed, and on defence lawyers in sifting through the communications that are disclosed and determining which are relevant for the purpose of the trial. Finally, though by no means least, this development is of great concern to victims and perhaps other witnesses for reasons largely similar to those connected with the disclosure of counselling records. The communications may include some very personal information which the victim, quite understandably, does not wish to become known to the accused or to others who may become aware of it as a result of the disclosure.

6.44 The collection of such material during a criminal investigation cannot be treated as an optional extra. The prosecution – through the agency of the Gardaí – is obliged "to seek out and preserve" potentially relevant evidence. This has been made clear in a number of Supreme Court judgments, including *Braddish v DPP*[95] and *Dunne v DPP*.[96] As explained in the most recent version of the *Guidelines for Prosecutors*:

> "There is a duty to seek out evidence having a bearing on guilt or innocence. The obligation does not require the investigator to engage in disproportionate commitment of manpower or resources in an exhaustive search for every conceivable kind of evidence. The duty must be interpreted reasonably in light of the facts of each case. The duty to seek out and preserve evidence is to be realistically interpreted and the relevance or potential relevance of the evidence needs to be considered. There is an obligation and responsibility on defence lawyers to seek material they consider relevant." [97]

6.45 Material of the kind being discussed here is subject to the general rules governing disclosure. It does not come within the purview of s. 19A of the Criminal Evidence Act 1992 which deals solely with counselling records. As outlined earlier, the prosecution

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95 [2001] 3 I.R. 127.
96 [2002] 2 I.R. 305.
97 Office of the Director of Public Prosecutions, *Guidelines for Prosecutors,* 5th ed. (Dublin, 2019), para. 9.21.

is constitutionally obliged to disclose all relevant material within its possession which may either help the defence or damage the prosecution. Moreover, the responsibility for making full and proper disclosure rests primarily with the prosecution, although the trial court may, if called upon to do so, resolve any dispute that arises if, for example, there is a claim of privilege.[98] The disclosure obligations of the Director of Public Prosecutions are set out in very clear and specific terms in the *Guidelines for Prosecutors*, which are drawn up and published by the Director.[99] The key consideration is, in effect, the relevance of the material to the matters to be determined at trial. Data from electronic sources can undoubtedly be relevant, and perhaps highly relevant, which means that, unless protected by some form of privilege, their disclosure will be mandatory.

6.46 It must, of course, be acknowledged that the problem we are discussing does not arise solely in sexual offence cases. Significant amounts of material from electronic sources may also be gathered during the investigation of other offences. Indeed, it may prove crucial to the outcome of a murder trial, to give but one example. Undoubtedly, therefore, and irrespective of the nature of the offence, material of this nature can potentially be highly relevant. It can also, of course, be quite voluminous in sexual offence cases, especially if the parties were well known to each other. Having consulted with practitioners and others who have first-hand experience of the area, we have had to conclude that there is a limit to what can be done to control the volume of this kind of material. We certainly appreciate the burden it imposes on police investigators, prosecution and defence and, although it is outside our Terms of Reference, we are sympathetic to submissions made to us by some defence lawyers that the remuneration they receive under the Criminal Legal Aid Scheme should reflect the significantly increased volume of work which they must now undertake in dealing with disclosure.

6.47 It is crucially important that the disclosure obligations imposed on the prosecution should be observed and implemented to a consistent standard throughout the State. The same applies to any obligations imposed on statutory and other bodies and individuals in relation to furnishing counselling records to the Director of Public Prosecutions, as outlined in Para 6.41 above.

6.48 We strongly encourage the Gardaí to continue to act with sensitivity and restraint when collecting data of this kind, particularly from victims. Often, as part of their investigation, they must take possession of mobile phones, laptops or other devices, and retain them until the trial. Victims from whom such devices must be taken should be given appropriate assistance, including, where necessary, a replacement device. Gardaí should explain fully to persons whose data is being sought the reasons why it may be needed and its possible significance in any future trial. Reasonable temporal limits should be observed, in the sense that any data collected should be realistically connected time wise to the circumstances of the alleged offence. We have been informed that this reflects existing practice and, if so, we commend it. There have several media reports of cases in England and Wales where victims were abruptly

98 *DPP v Special Criminal Court* [1999] 1 I.R. 60.

99 Office of the Director of Public Prosecutions, *Guidelines for Prosecutors,* 5th ed. (Dublin, 2019), Chap, 9.

told that unless they handed over their mobile phones and other devices, the case would not proceed.[100] The Group understands that in Ireland these matters are handled more sensitively, and we strongly urge that this should continue. Having said this, it would be desirable to have a formal code of practice setting out the procedures to be followed in collecting and disclosing such data and that this should be made available to victims. Moreover, the operation of the system should be subject to periodic evaluation, with feedback being sought from victims as to their experience of this aspect of the criminal investigation.

6.49 Very recently, in *R v Carl Bater-James and Sultan Mohammed*[101] the English Court of Appeal (Criminal Division) considered at length the principles that should govern the collection and disclosure of a victim's digital records. The Court stressed, first of all, that there is no obligation on investigators to seek to review a victim's digital material without good cause. There must be a proper basis for an inspection request and this will usually be a reasonable belief that the review may reveal material relevant to the investigation or the likely issues at trial. It must, in other words, be part of a reasonable line of inquiry. There may, in some instances, be ways in which such a line of inquiry can be conducted without a witness having to surrender their electronic devices. In answer to the question "when does it become necessary to attempt to review a witness's digitally stored communications and when is it necessary to disclose digital communications to which the investigators have access?", the Court of Appeal said:

> "[W]e stress that regardless of the medium in which the information is held, a 'reasonable line of inquiry' will depend on the facts of, and the issues in, the individual case, including any potential defence. There is no presumption that a complainant's mobile telephone or other devices should be inspected, retained or downloaded, any more than there is a presumption that investigators will attempt to look through material held in hard copy. There must be a properly identifiable foundation for the inquiry, not mere conjecture or speculation. Furthermore, as developed below, if there is a reasonable line of inquiry, the investigators should consider whether there are ways of readily accessing the information that do not involve looking at or taking possession of the complainant's mobile telephone or other digital device. Disclosure should only occur when the material might reasonably be considered capable of undermining the prosecution's case or assisting the case for the accused."

All of this, of course, was said in the context of the present English law and practice relating to disclosure although, as is clear from the final sentence of the passage just quoted, the essential criterion for disclosure from the prosecution to the defence is the same in both jurisdictions. The Working Group is not suggesting that everything said in *Bater-James* represents what the law and practice is, or should be, here in

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100 See, for example, Owen Bowcott, "CPS and police 'making intrusive demands of rape accusers", *The Guardian,* 7 July 2019; Owen Bowcott, "Police consult victims' groups over digital evidence consent forms", *The Guardian,* 3 May 2019; Vera Baird QC (Victims' Commissioner), "Standing up for rape complainants and their right to privacy", *The Guardian,* 18 July 2019.

101 [2020] EWCA Crim.790.

Ireland. However, it would endorse the fundamental principle that the digital records of a victim or other witness should be reviewed only as a part of a definite line of inquiry.

6.50 Our main concern in the present context is with preventing unwarranted invasions of victims' privacy through disclosure of their electronic communications and internet usage. Subject to the qualifications mentioned in the previous paragraph, we accept that such data must often be gathered during the investigation of an alleged sexual offence. However, the considerations that motivated the introduction of s. 19A of the Criminal Evidence Act 1992 are also relevant in this context. Whoever is responsible for disclosing this evidence to the defence (primarily the prosecutor, though a court may also be called upon to adjudicate upon the matter) must have due regard to the privacy interests of the victim or any other person affected by the disclosure. The standard test of relevance should be strictly applied, in accordance with the DPP's *Guidelines for Prosecutors* which provide (Para. 9.25) that "if it is reasonably possible that something is relevant and there is no other obstacle to disclosure, the balance is in favour of disclosure." We approve of that approach.

## SUMMARY OF RECOMMENDATIONS

- **Section 3 of the Criminal Law (Rape) Act 1981, as amended, which governs the questioning of victims at sexual offence trials, should be retained in its present form, but there should be an additional provision allowing the barrister who is briefed to represent the victim when an application is being made to engage in such questioning to continue to represent the victim while the questioning, if permitted by the trial judge, is taking place.**

- **The right to separate legal representation for victims under section 4A of the Criminal Law (Rape) Act 1981 (in circumstances where an application is made to question a victim about other sexual experience) should be extended to include trials for sexual assault.**

- **Appropriate steps should be taken to ensure that judges and lawyers are familiar with section 21 of the Criminal Justice (Victims of Crime) Act 2017, especially as it relates to the questioning of victims during sexual offence trials.**

- **Where the defence intends to apply to the trial judge for leave to question a victim about other sexual experience under the terms of s. 3 of the Criminal Law (Rape) Act 1981, it should be required to notify the judge conducting the preliminary trial hearing of that intention. It is only in exceptional circumstance that such an application should be permitted at trial unless it has been notified at the preliminary trial hearing.**

- **Once notification has been given at a preliminary trial hearing of intention to apply for leave to question a victim at trial under the terms of section 3 of the Criminal Law (Rape) Act 1981, the Legal Aid Board should be immediately informed. The Legal Aid Board, in turn, should endeavour to ensure that the victim is represented by counsel of a level of seniority similar to that of counsel representing the prosecution and defence.**

- **Effective steps should be taken to bring the existence of section 19A of the Criminal Evidence Act 1992 regarding the disclosure of counselling records to the attention of victims and any persons who are advising them. It is important that victims should be aware of their right to object to the disclosure of such records.**

- **Further consideration should be given to the question of whether the disclosure of medical records should be made subject to a statutory regime similar to that applicable to the disclosure of counselling records.**

- **A positive obligation should be imposed, by statute if necessary, on all statutory or public bodies, voluntary bodies and independent counsellors holding counselling records to furnish those records promptly to the Director of Public Prosecutions once requested to do so.**

- **A formal code of practice should be established to govern the collection and disclosure of a victim's digital material and electronic data such as text messages, social media and internet usage. There should be a periodic evaluation of the process and, as part of that, feedback should be sought from victims as to their experience of this aspect of the criminal investigation.**

# CHAPTER 7: INFORMATION FOR VICTIMS

7.1 Victims of sexual crime need to have ready access to information about certain matters that are of crucial importance to them, including how to report the crime, the availability of counselling, medical, forensic and other support services, and the operation of the criminal process. In this chapter, we make a number of recommendations designed to improve both the public availability of such information and the provision of information and advice to victims on an individual basis. We also stress the importance of periodically seeking feedback from victims about their experience of, and satisfaction with, any measures that are adopted to give effect to these recommendations.

7.2 Time and again, research has shown that what many crime victims desire most is information about the progress of the police investigation and any legal proceedings that follow.[102] Historically, victims were not well treated this respect. Once they made the initial complaint or report to the police, they were seldom kept informed about later developments unless they were needed as witnesses at a contested trial. In fact, if the accused eventually pleaded guilty, the victim might remain unaware of the outcome of the case unless he or she happened to see it reported in the media or learned of it in some other way. One advantage of allowing for victim impact evidence at sentencing (introduced by the Criminal Justice Act 1993) is that it at least guarantees, even in those cases where a conviction results from a guilty plea, that the victim becomes aware of the verdict and will be able to participate in the sentencing hearing. Of course, many complaints made to the police never result in a criminal conviction, and there can be many reasons for that. Even then, victims should have the right to be kept informed of developments and be given more general information about the operation of the criminal justice system.

7.3 It must be acknowledged that there have been many improvements in this area over the years. The introduction of victim impact evidence, as already noted, was one important development. More recently, the Criminal Justice (Victims of Crime) Act 2017, which gave effect to the EU Directive on Victims' Rights, imposes very significant obligations on the Garda Síochána (or the Garda Síochána Ombudsman Commission, as the case may be) to furnish information to persons claiming to have been victimised by criminal conduct. Part 2 of the Act provides a detailed list of the matters of which such persons must be informed on their first contact with the Gardaí (s.7) and during the course of investigations and criminal proceedings (s. 8). They must also be informed on decisions regarding prosecution (s. 9) and of the system for reviewing decisions not to prosecute (s. 10). These are welcome innovations and the details of them need not be reviewed here. Further, as outlined later in this Chapter, the Director of Public Prosecutions has a system in place to familiarise victims in sexual offence cases with the trial process before a trial begins. Last, though by no means least, we would like to acknowledge the tremendously valuable work done by victim support groups, and rape crisis centres in particular, in helping victims of

102 See, for example, Joanna Shapland, Jon Willmore and Peter Duff, *Victims in the Criminal Justice System* (Aldershot: Gower, 1985).

sexual offences to understand the criminal justice process and of the victim's role within it.

7.4 All of these developments are welcome. The provisions of the Criminal Justice (Victims of Crime) Act 2017, when implemented fully and in the right spirit, should go a considerable way towards addressing the information deficit about which crime victims have often, and with good reason, complained. Indeed, it should be recorded that, even before the enactment of this legislation, many individual Gardaí went to great lengths to keep victims informed of the progress of investigations and prosecutions, and to support them in various ways. They will doubtless continue to do so. Further, An Garda Síochána have produced a Victim Information Card for presentation to a crime victim at first contact, together with a victim information booklet. The card provides basic details as to how a victim may access information on his or her rights and it includes the name and contact details of the Garda who took the initial crime report. The booklet is a more comprehensive document outlining the rights of victims of crime and the range of victim-oriented services and other resources that may be provided by the Garda Síochána and by other statutory and non-governmental agencies. The Victim Information Booklet is available in 38 languages to all persons, irrespective of whether the victim has reported the crime to the Garda Síochána. Printed copies are available on request. However, there was a general view among our consultees that some more formal or institutionalised system is needed to ensure that every victim of a sexual offence has access to information and advice as to how the criminal justice process operates, about the rights and duties of victims and witnesses, about the services available to them and the role, if any, they can expect to play at different stages of the process. The Working Group agrees that such a system is needed and it recommends one initiative that might usefully be taken, namely the creation of a website, to provide relevant information for victims.

7.5 The information needed by victims is not exclusively legal in nature. They may also need advice about the availability of counselling, therapeutic and medical services. Further, in so far as legal advice is concerned, the provisions of the Criminal Justice (Victims of Crime) Act 2017 are undoubtedly welcome but, under section 7, it is only on the victim's first contact with the Gardaí that the relevant information will be provided. This, of course, will be the first opportunity that the Gardaí have to give the information in question. As noted in the previous paragraph, the Gardaí have an information card and information booklet available for all victims. However, many victims may need information and advice in the immediate aftermath of the offence and before making any approach to the Gardaí. They may also need information throughout the entire criminal process which, it must be recalled, does not always end once a verdict is delivered at the conclusion of the trial (where a trial takes place) and with the sentence, in the event of a guilty verdict. The convicted person may appeal against conviction, sentence or both. The Director of Public Prosecutions may bring an application to the Court of Appeal if she is of the opinion that the sentence imposed by the trial court was unduly lenient. In exceptional circumstances and on limited grounds, the Director may appeal against an acquittal. If the offender is sentenced to imprisonment, he will be entitled to standard remission and may also

qualify for parole under the terms of the Parole Act 2019, once it is commenced[103]. Prisoners may also be granted temporary release under the Criminal Justice Act 1960 or be subject to post release Probation supervision. A sentencing court may order an offender to pay compensation to the victim under the Criminal Justice Act 1993, and a victim may also qualify for state-funded compensation under the non-statutory Criminal Injuries Compensation Scheme. All of these are matters about which victims should be able access information and advice in a timely manner and without undue difficulty.

7.6 At present, victims have access to services, provided by both the public and voluntary sectors, that will inform them about many of the issues mentioned in the previous paragraph. However, gaps undoubtedly exist and the challenge, as we see it, is to establish an integrated system to ensure that victims have access to relevant advice and information from the time at which the offence is committed until the criminal process in the particular case has run its course. In the remainder of this chapter, we attempt to map out the contours of such an integrated system though we accept that the more detailed implementation arrangements will require further consideration. We begin by recommending the establishment of an official website containing general information for victims of sexual crime, including information about accessing relevant services and the broad outline of the criminal process. We then proceed to make recommendations for the provision of legal advice for victims on an individual basis, advice that should be available irrespective of whether there is a prosecution for the offence in question. Finally, we deal with court familiarisation and arrangements for assisting victims during criminal proceedings, bearing in mind the arrangements already in place in this regard.

## General information for victims

7.7 As mentioned at the beginning of this chapter, victims of sexual crime need both general information about reporting the offence, the availability of support services and so forth, and more individualised advice as the criminal process unfolds. In so far as the provision of general information is concerned, we recommend that this is best achieved by having a dedicated website created and maintained by a Government department or a designated agency within the public sector. This website would provide essential information about all the matters just mentioned. Such a website, we stress, is not intended as a substitute for more individualised advice and counselling. Rather it is intended, first and foremost, to provide victims with the kind of information they typically need in the aftermath of the offence or at a time when they are considering reporting an offence committed against them in the past. However, it would go further by providing information about issues that are likely to arise at different stages in the process, including the appeal stage, and about the availability of compensation for injuries that have been criminally inflicted. In effect, it would provide a road map to the services available and the manner in which the criminal process is likely to unfold after a complaint is made to the Gardaí.

103 At present there is a non-statutory parole board which makes recommendations to the Minister for Justice and Equality in relation to the release of long-term prisoners.

7.8 All information on the website should be presented in clear, accessible and non-technical language. It is also critically important that the content of the website should be constantly monitored to ensure, for example, that all contact details for services listed are valid and up to date. The Government department or agency responsible for the creation and maintenance of the website should take steps to ensure that its existence is brought to the attention of the public on an ongoing basis. The objective must be to ensure that anyone who has the misfortune to become a victim of a sexual crime is able to access essential, relevant information as quickly and conveniently as possible. The website should include links to other sources of information including the Victims Charter drawn up by the Department of Justice and Equality which contains a good deal of useful information and to the website of the Director of Public Prosecutions (www.dppireland.ie) which has a section prominently devoted to "Victims & Witnesses". Included in that section is a booklet entitled *Going to Court as a Witness* which is very useful.

## Access to legal advice for victims

7.9 Individual victims of sexual crime may also need information and advice that is tailored to the circumstances of their particular case. We acknowledge that many victims do not currently have access to such advice, and we therefore recommend the adoption of certain measures, as described below, to address this situation.

7.10 As already noted, the Criminal Justice (Victims of Crime) Act 2017, the relevant provisions of which entered into force in November 2017, provides that victims on their first contact with the Gardaí, should be given information on a wide range of matters including the role of the victim in the criminal process, any special protection measures available, compensation measures and so forth. While it may be assumed that Gardaí are implementing these provisions faithfully, there has not as yet been any evaluation of how this is being done or of what the experience of victims has been since the legislation was brought into effect. Further, it must be understood that victims who are given all this information on their first point of contact, or even at a later stage, may have difficulty absorbing or remembering all it. This may be especially true of victims of sexual offences who, more often than not, will be suffering from trauma and distress when reporting the offence and, indeed, for a considerable time thereafter. Something more is therefore needed.

7.11 The Working Group notes that An Garda Síochána has been planning the roll-out of an ACTIVE Mobility Project, where Gardaí are provided with devices containing Garda ACTIVE Mobility Apps. The aim of the ACTIVE mobility service is to give Garda members instant and secure access to a wide range of Garda information and services, regardless of their location. It is also noted that the Garda Síochána has produced an electronic version of its Victim Information booklet in 38 languages. We recommend that An Garda Síochána develop a Garda ACTIVE Mobility App that will advise Garda members of the information they should be providing to victims of crime in accordance with the Criminal Justice (Victims of Crime) Act 2017. That App should also, where possible, be capable of transferring to a mobile device, an email address or other information telecommunications app, an electronic version of the

Victim Information Card and Victim Information booklet in a language understood by the victim.

7.12 We recommend that every victim of sexual crime should have the opportunity to receive free legal advice if he or she considers that such would be helpful. Of course, victims are always free to seek legal advice privately, assuming they can afford to do so. As a matter of fairness, however, all victims should be in a position to seek and obtain appropriate legal advice, irrespective of means. At present, section 26(3A) of the Civil Legal Aid Act 1995, as inserted by the Civil Law (Miscellaneous Provisions) Act 2008, provides:

> "Notwithstanding any other provision of this Act, the [Legal Aid] Board shall grant legal advice to a complainant in a prosecution for –
>
> (a) the offence of rape under the common law,
> (b) the offence of rape under section 2 of the Criminal Law (Rape) Act 1981,
> (c) the offence of aggravated sexual assault under section 3 of the Criminal Law (Rape) (Amendment) Act 1990,
> (d) the offence of rape under section 4 of the Criminal Law (Rape) (Amendment) Act 1990,
> (e) an offence under section 6 (substituted by section 2 of the Criminal Law (Sexual Offences) (Amendment) Act 2007) of the Criminal Law (Sexual Offences) Act 1993.
> (f) an offence under the Criminal Law (Sexual Offences) Act 2006,
> (g) an offence of incest under section 1 or 2 of the Punishment of Incest Act 1908."

7.13 There seems to be little public awareness of this provision. However, it seems to us that, with some amendments, section 26(3A) provides a suitable framework for the delivery of individualised legal advice to victims of sexual crime. As it is now phrased, the section is quite restricted in a number of respects. First, it applies solely to "a complainant in a prosecution for [one of the listed offences]." We recommend that the section be amended to provide that legal advice is available free of charge to a victim of any sexual crime. The provision of such advice should not be contingent on there being a prosecution. Rather it should be available to any person complaining that a sexual crime has been committed against them.

7.14 Secondly, we recommend that the range of offences to which the section applies should be extended to include sexual assault and any offence under sections 3 to 8, 18, 21 and 22 of the Criminal Law (Sexual Offences) Act 2017. Sexual assaults can admittedly vary in gravity, but they may be quite serious in nature. After all, the maximum sentence for sexual assault, following conviction on indictment, is now 10 years' imprisonment or 14 years where the victim was under 17 years when the assault was committed.[104] Moreover, sexual abuse, especially of children, sometimes consists of a series of sexual assaults without any of the offences that are currently listed in section 26(3A) being committed. Yet, subjection to a series of sexual assaults is invariably very harmful and traumatic for a victim.

104 Criminal Law (Rape) (Amendment) Act 1990, s. 2 as amended by Sex Offenders Act 2001, s. 37.

7.15 Sections 3 to 8 of the Criminal Law (Sexual Offences) Act 2017 introduce several new child exploitation offences including, for example, obtaining a child for the purpose of sexual exploitation (section 3). Section 18 creates a new offence of a sexual act committed by a person in authority with a child aged between 17 and 18 years. Sections 21 and 22 create new offences against a person with a mental or intellectual disability.

7.16 We consider it important that a victim of sexual assault or of any of the offences mentioned in the previous paragraph that were created by the Criminal Law (Sexual Offences) Act 2017 should have access to legal advice on the same basis as a person who is the victim of any of the offences listed in section 26(3A) of the Civil Legal Aid Act 1995, as it stands.

7.17 Thirdly, as section 26(3A) is now phrased, it applies solely to "complainants". It is, of course, vitally important that complainants should continue to have access to such advice. However, children and persons with disabilities may not be aware of this service or be in a position to avail themselves of it. We recommend therefore that where the victim is a child or a person with a mental or intellectual disability, a parent, guardian or another adult who is responsible for the victim's care should also be entitled to obtain advice under section 26(3A), and that the terms of the section be amended accordingly. Needless to say, this would not apply where the parent or adult in question was the suspected or alleged offender.

7.18 This is an outline of our recommendation for the provision of legal advice to victims of sexual crime and, where appropriate, to their guardians. We are conscious, as always, of the heavy workload of the Legal Aid Board. However, what we recommend here is broadly in line with the Board's existing obligations under the Act of 1995, save that the entitlement to legal advice should be extended in the ways just mentioned. We appreciate that solicitors directly employed by the Board may not always be in a position to offer advice to every victim who seeks it. However, a system should be introduced whereby, in such circumstances, a victim is given a voucher enabling him or her to seek advice from a solicitor in private practice who would then be remunerated by the Board. The all-important considerations are that a victim should be able to obtain advice as quickly as possible and, secondly, that the advice should come from a solicitor who has detailed knowledge and experience of the criminal justice system and, in particular, of the substantive and procedural law relating to sexual offences. We accept that the implementation of this proposal will require more detailed consideration by the Minister for Justice and Equality but we recommend that steps be taken to implement these measures, or others that are equally effective, as soon as possible.

7.19 A question may arise in the future as to whether, in the event of a criminal trial taking place, a defendant might seek disclosure of notes made by a solicitor advising a victim under the system we have just described. We believe however that any communications between a victim (the client) and a solicitor in this context would be, and should be, governed by professional legal privilege. Under the law relating to privilege, a client may waive the privilege, but the solicitor may not.

7.20 However this recommendation is implemented, the objective must be to ensure that all victims of sexual crime will have an opportunity to discuss their concerns

confidentially and unhurriedly with a professional lawyer who has the knowledge and experience to deal with any questions they may have in the immediate aftermath of the offence (or after the reporting of the offence), and any further questions that arise as the case progresses. The lawyers providing this service would not be advocates or even support persons. Rather their role would be to ensure that victims are well informed about relevant aspects of the criminal justice process and made aware of support services available to them. Information about this service should be included in the website we have earlier recommended.

## Witness familiarisation

7.21 Victims will often, and understandably, experience anxiety and stress in the run-up to a criminal trial. They will be aware by then that they will have to attend court, testify and, in all probability, undergo cross-examination. Being required to testify in criminal proceedings will always be stressful to some degree. This, of course, is particularly true of sexual offence trials, given the intensely personal nature of the matters about which a victim may be questioned. As we have already stated in Chapter 6, victims are entitled to be treated with fairness, dignity and respect throughout the trial and in related proceedings. However, it can also be very helpful for victims to have been familiarised in advance of the trial with the setting in which it will take place and of their own role within it. Witness familiarisation procedures are therefore of great importance.

7.22 At the outset, a clear distinction must be drawn been witness familiarisation and witness coaching. Under no circumstances may a witness be coached as to the evidence that he or she should give or as to the appropriate response to any questions put during examination-in-chief or cross-examination. Familiarisation, which is quite unobjectionable and, in many ways, desirable, means informing witnesses about the nature of the trial process, and the role of each participant, including the victim, within it. Where special facilities are being made available for vulnerable witnesses, these too should be clearly explained to the witnesses in question. Coaching is concerned with the substance of the evidence to be given, and it can take a variety of forms. It could involve simply telling witnesses the answers they should give to specific questions or it might involve something more elaborate such as a witness training programme, perhaps involving role play, in which witnesses are effectively primed as to how they should deal with questions put to them. The distinction between coaching and familiarisation, and the reasons why coaching cannot be tolerated were eloquently expressed by Judge L.J. in *R v Momodou and Limani*[105]and what he had to say is worth quoting at some length:

> "There is a dramatic distinction between witness training or coaching, and witness familiarisation. Training or coaching for witnesses in criminal proceedings (whether for prosecution or defence) is not permitted. This is the logical consequence of the well-known principle that discussions between

105 [2005] EWCA Crim. 177; [2005] 2 Cr. App. R. 6, paras 61, 62, 64 and 65.

witnesses should not take place, and that the statements and proofs of one witness should not be disclosed to any other witness… The witness should give his or her own evidence, so far as practicable uninfluenced by what anyone else has said, whether in formal discussions or informal conversations. The rule reduces, indeed hopefully avoids any possibility, that one witness may tailor his evidence in the light of what anyone else said, and equally, avoids any unfounded perception that he may have done so. These risks are inherent in witness training. Even if the training takes place one-to-one with someone completely remote from the facts of the case itself, the witness may come, even unconsciously, to appreciate which aspects of his evidence are perhaps not quite consistent with what others are saying, or indeed not quite what is required of him. An honest witness may alter the emphasis of his evidence to accommodate what he thinks may be a different, more accurate, or simply better remembered perception of events. A dishonest witness will very rapidly calculate how his testimony may be "improved". These dangers are present in one-to-one witness training. Where however the witness is jointly trained with other witnesses to the same events, the dangers dramatically increase. Recollections change. Memories are contaminated. Witnesses may bring their respective accounts into what they believe to be better alignment with others. They may be encouraged to do so, consciously or unconsciously. They may collude deliberately. They may be inadvertently contaminated. Whether deliberately or inadvertently, the evidence may no longer be their own. Although none of this is inevitable, the risk that training or coaching may adversely affect the accuracy of the evidence of the individual witness is constant. So we repeat, witness training for criminal trials is prohibited.

This principle does not preclude pre-trial arrangements to familiarise witness with the layout of the court, the likely sequence of events when the witness is giving evidence, and a balanced appraisal of the different responsibilities of the various participants. Indeed such arrangements, usually in the form of a pre-trial visit to the court, are generally to be welcomed. Witnesses should not be disadvantaged by ignorance of the process, nor when they come to give evidence, taken by surprise at the way it works. None of this however involves discussions about proposed or intended evidence. Sensible preparation for the experience of giving evidence, which assists the witness to give of his or her best at the forthcoming trial is permissible. Such experience can also be provided by out of court familiarisation techniques. The process may improve the manner in which the witness gives evidence by, for example, reducing the nervous tension arising from inexperience of the process. Nevertheless the evidence remains the witness's own uncontaminated evidence. Equally, the principle does not prohibit training of expert and similar witnesses in, for example, the technique of giving comprehensive evidence of a specialist kind to a jury, both during evidence-in-chief and in cross-examination, and, another example, developing the ability to resist the inevitable pressure of going further in evidence than matters covered by the witnesses' specific expertise. The critical feature of training of this kind is that it should not be arranged in the context of nor related to any forthcoming trial, and it can therefore have no impact whatever on it.

[….]

> This familiarisation process should normally be supervised or conducted by a solicitor or barrister, or someone who is responsible to a solicitor or barrister with experience of the criminal justice process, and preferably by an organisation accredited for the purpose by the Bar Council and Law Society. None of those involved should have any personal knowledge of the matters in issue. Records should be maintained of all those present and the identity of those responsible for the familiarisation process, whenever it takes place. The programme should be retained, together with all the written material (or appropriate copies) used during the familiarisation sessions. None of the material should bear any similarity whatever to the issues in the criminal proceedings to be attended by the witnesses, and nothing in it should play on or trigger the witness's recollection of events. As already indicated, the document quoted in paragraph 41, if used, would have been utterly flawed. If discussion of the instant criminal proceedings begins, as it almost inevitably will, it must be stopped. And advice given about precisely why it is impermissible, with a warning against the danger of evidence contamination and the risk that the course of justice may be perverted. Note should be made if and when any such warning is given.
>
> All documents used in the process should be retained, and if relevant to prosecution witnesses, handed to the Crown Prosecution Service as a matter of course, and in relation to defence witnesses, produced to the court. None should be destroyed. It should be a matter of professional obligation for barristers and solicitors involved in these processes, or indeed the trial itself, to see that this guidance is followed."

The first two paragraphs of this passage were quoted with approval by the High Court (Charleton J.) in *O'R v DPP*[106] where the applicant sought to have his trial for a sexual offence prohibited on the basis that the complainant had been coached as to the evidence she should give. Having regard to the particular facts, the court refused the application. Having quoted from *Momodou,* Charleton J. went on to say:

> "Where I differ from later passages in the decision of Judge L.J. is in his insistence that familiarisation visits to courts by victims and alleged victims should be fully recorded by note. I see that process as banal and neutral and not requiring anything other than a file note by the prosecution solicitor that it occurred. Even after such a visit, a witness may need to be interviewed again."[107]

The Working Group agrees with Charleton J. that a file note by a prosecution solicitor should be a sufficient record of a court familiarisation visit.

## Existing familiarisation procedures

7.23 The office of the Director of Public Prosecutions, in collaboration with An Garda Síochána, already operates a witness familiarisation system for victims in serious sexual offence cases. Every such victim has an opportunity to meet with professional staff of the office in order to be informed of the trial process and given an opportunity

106 [2011] IEHC 368.
107 *O'R v DPP* [2011] IEHC 368, para. 23.

to visit a courtroom in advance of the trial. This practice is to be commended and should continue. Victims have found the experience to be very helpful, though we recommend that there should be a periodic survey of victims in order to obtain feedback about their experience of the familiarisation process. However, we strongly commend this practice on the part of the Director of Public Prosecutions and An Garda Síochána and hope that it will continue. Further, it is vitally important that this service should be available to all victims of sexual crime in advance of trial, irrespective of the court or locality in which the trial is being held. We also note it is the policy of the DPP for State Solicitor and Counsel to meet with victims in cases being dealt with in Circuit Courts nationwide.

## Support for victims in court

7.24 Victim familiarisation is of the utmost importance at the pre-trial stage. Victims also need support, often of a more personal or emotional nature, during trial, including the sentencing hearing and any later appeal. At present, a group of trained volunteers provide an excellent service in the Criminal Courts of Justice (CCJ) in Dublin where most trials for serious sexual offences are held. In the CCJ and in a number of other court locations throughout the country this service is provided by V-SAC (Victim Support at Court). We are also aware of the valuable service provided by CARI for child victims in a number of locations, including Limerick, Kilkenny, Cork, Wexford and Ennis. We strongly commend this practice and wish to express our admiration and gratitude for the generosity and commitment of the volunteers who provide the service. All the indications are that victims find it most helpful. However, as indicated in Chapter 2 above, we are conscious that quite a number of sexual offence trials take place in Circuit Courts throughout the country and the number of such trials is likely to increase as prosecutions are brought for the new offences created by the Criminal Law (Sexual Offences) Act 2017. Victims of sexual crime should have the same level of support irrespective of the court or the location in which a trial is held. At present, there are no court accompaniment services available in several court venues throughout the country. One of our core recommendations throughout this report is that victim support services should be of a consistent standard throughout the country. We therefore recommend that the Department of Justice and Equality or another state agency should undertake a review of court accompaniment services with a view to ensuring, in so far as possible, that they are available in all court venues.

## Vulnerable defendants

7.25 In this chapter we have dealt with the information needs of victims only, though we are conscious that a defendant may also be vulnerable on account of age, disability or some other factor. However, we are entitled to assume that defendants will have access to legal advice and representation from the outset. Indeed, every person charged with an offence of any appreciable degree of seriousness is entitled to free legal aid if they lack the means to pay for their own representation. Lawyers representing defendants will naturally take care to provide their clients with all relevant information about the criminal process as well as providing them with

advice tailored to the particular charges they are facing. They will also, as a rule, arrange for a defendant to undergo a medical or psychiatric assessment where they deem that to be appropriate. For this reason, we did not consider it necessary to make any specific recommendations for the provision of legal advice or information to vulnerable defendants.

## SUMMARY OF RECOMMENDATIONS

- **The Department of Justice and Equality or an appropriate state agency should establish a website, the existence of which would regularly be brought to public attention, containing comprehensive information for victims of sexual crime. This information should be presented in a clear and accessible manner and deal with matters such as the reporting of sexual offences, the trial process, the availability of legal advice, and the availability of counselling, therapeutic and other assistance for victims.**

- **An Garda Síochána should develop a Garda ACTIVE Mobility App that will advise Garda members of the information they should be providing to victims in accordance with the Criminal Justice (Victims of Crime) Act 2017. The App should also, where possible, be capable of sharing to a mobile device, an email address or other information telecommunications app, an electronic version of the Victim Information Card and Victim Information Booklet in a language understood by the victim.**

- **Section 26(3A) of the Civil Legal Aid Act 1995 should be amended to provide that the Legal Aid Board may provide free legal advice to victims of sexual offences (and not just in cases where a prosecution is being taken).**

- **The range of offences to which section 26(3A) of the Civil Legal Aid Act 1995 applies should be extended to include sexual assault and the offences created by sections 3 to 8 of the Criminal Law (Sexual Offence) Act 2017 (which outlaw various forms of child sexual exploitation), section 18 (which relates to a sexual act by a person in authority with a young person aged between 17 and 18 years) and sections 21 and 22 (which relate to the sexual abuse of persons with mental illness or a mental or intellectual disability).**

- **Section 26(3A) Civil Legal Aid Act 1995 should further be amended to provide legal advice, in appropriate circumstances, to a parent, guardian or other responsible adult where the victim is a child or a person with a mental illness or intellectual disability. This would not apply where the parent or other responsible adult is the suspected or alleged offender.**

- **A court familiarisation service should be available to every victim who is due to appear as a witness in criminal proceedings. We recommend that the present witness familiarisation programme operated by the Director of Public Prosecutions and An Garda Síochána should continue and, further, that it should be available to all victims of sexual crime throughout the country. We further recommend that a similar service be available to victims in District Courts outside Dublin where generally An Garda Síochána will have carriage of the prosecution.**

- **Victims of a sexual offence should be entitled to have some personal support during criminal proceedings relating to the offence. We strongly commend the support now operated on a voluntary basis in the Criminal Courts of Justice in Dublin and in some other court venues, but we recommend that steps be taken to ensure that such a service, or an equivalent service of equal standard, is available to all victims of sexual crime throughout the country.**

# CHAPTER 8: INTERMEDIARIES

8.1 The standard modes of eliciting evidence within the adversarial trial system can pose particular difficulties for children and persons with disabilities who are called as witnesses. They may struggle to understand some of the questions put to them or to answer those questions in terms that are deemed satisfactory by their interlocutors or, indeed, by the court. Their answers may also be influenced by the language in which questions are phrased. As discussed further in Chapter 10 of this Report, children are most likely to give their best evidence when questioned in an age-appropriate manner. The overall quality of the evidence elicited will be seriously undermined if the witness does not properly understand the questions put or is unable to find words that truthfully express the answers he or she wishes to give. Many countries have now adopted special measures to address this problem. As the English Court of Appeal said in *R v Lubemba*:[108]

> "It is now generally accepted that if justice is to be done to the vulnerable witness and also to the accused, a radical departure from the traditional style of advocacy will be necessary. Advocates must adapt to the witness, not the other way round."

This chapter will address one such special measure, the use of intermediaries. At the outset, however, it is helpful to recall again that Article 13 of the Convention on the Rights of Persons with Disabilities requires that persons with disabilities have effective access to justice on an equal basis with others and that appropriate accommodations be made available to facilitate their participation, as witnesses or otherwise, in all legal proceedings, including at the investigatory and other preliminary stages. Ireland ratified this Convention in March 2018.[109]`

8.2 Research has shown that, internationally, a significant proportion of people entering the criminal justice system, whether as witnesses or defendants, meet the criteria of being vulnerable witnesses, particularly on account of mental illness or disability.[110] There is no reason to believe that the situation in Ireland is any different. Justice demands that all such persons should be able to participate in criminal proceedings on an equal basis with others and that special facilities, including intermediaries, should be made available in order to accomplish this goal.

8.3 The idea of using intermediaries, in these islands at least, may be traced back to the Pigot Report published in England in 1989. That report had envisaged that a court could order that questions put by an advocate to a child witness could be relayed through a "paediatrician, child psychiatrist, social worker or person who enjoys the

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108 [2014] EWCA Crim 2064.

109 See Chapter 1 above.

110 Brendan M O'Mahony, "The emerging role of the Registered Intermediary with the vulnerable witness and offender: Facilitating communication with the police and members of the judiciary" (2009) 38 *British Journal of Learning Disabilities* 232; Ilana Hepner, Mary N. Woodward and Jeanette Stewart, "Giving the vulnerable a voice in the criminal justice system: The use of intermediaries with individuals with intellectual disability" (2015) 22 *Psychiatry, Psychology and Law* 453.

child's confidence."[111] Under this proposal, which was never implemented, child witnesses would be provided with an interlocutor who took an active role in the questioning. A decade later, another report, *Speaking Up for Justice*, recommended that statutory provision be made for a "communicator or intermediary where this would assist the witness to give their best evidence at both the pre-trial hearing and the trial itself" and that a system for the accreditation of such persons be introduced.[112] Since then statutory provision has been made for intermediaries in several jurisdictions including Ireland, England and Wales and Northern Ireland.

8.4 The precise role accorded to intermediaries can vary, but their essential purpose is well summarised in a recent report of the Victoria Law Reform Commission:

> "The intermediary's role can take a number of forms, although the central function is to facilitate communication between the vulnerable victim and the prosecutor or the accused's lawyer, so that questions are asked in a way that the victim can understand. Intermediaries are not victim advocates or support people; their primary purpose is to ensure that the court receives the best evidence from these victims."[113]

Intermediaries are "experienced professionals with specific expertise in assessing and facilitating communication, and they assist witnesses and defendants to engage effectively in the trial process."[114] The functions, training and registration of intermediaries will be considered later in this chapter, but first we must examine the existing legal basis for their deployment in criminal proceedings.

## The present Irish legal framework

8.5 Ireland, as it happens, was very much to the fore in making formal legal provision for intermediaries, under the Criminal Evidence Act 1992. As originally enacted, s. 14 of the Act allowed for the use of an intermediary only in a trial for a sexual or violent offence and only where a person under the age of 17 years was giving or due to give evidence. Following amendment by the Children Act 2001 (which raised the witness age to 18 years) and the Criminal Justice (Victims of Crime) Act 2017, s. 14 of the 1992 Act now reads:

> "(1) Where (a) a person is accused of a relevant offence, and (b) a person under 18 years of age is giving, or is to give, evidence through a live television link, the court may, on the application of the prosecution or the accused, if satisfied that, having regard to the age or mental condition of the witness, the interests of justice require that any questions to be put to the witness be put through an intermediary, direct that any such questions be so put.

111 Home Office, *Report of the Advisory Group on Video Evidence* (the Pigot Report) (London, 1989), para. 2.32. One member of the Advisory Group dissented from this proposal.
112 Home Office, *Speaking Up for Justice* (London, 1998), p. 59.
113 Victoria Law Reform Commission, *Victims of Crime: Consultation Paper* (2015). para. 8-74.
114 JUSTICE, Working Party Report, *Prosecuting Sexual Offences* (London, 2019), para. 4.60.

> (1A) Subject to section 14AA, where (a) a person is accused of an offence, other than a relevant offence, and (b) a victim of the offence who is under 18 years of age, is giving, or is to give, evidence through a live television link, the court may, on the application of the prosecution or the accused, if satisfied that the interests of justice require that any questions to be put to the victim be put through an intermediary, direct that any such questions be so put.
>
> (2) Questions put to a witness through an intermediary under this section shall be either in the words used by the questioner or so as to convey to the witness in a way which is appropriate to his [or her] age and mental condition the meaning of the questions being asked.
>
> (3) An intermediary referred to in subsection (1) or (1A) shall be appointed by the court and shall be a person who, in its opinion, is competent to act as such."

A "relevant offence" for this purpose of this section is (a) a sexual offence, (b) an offence involving violence or the threat of violence to a person; (c) an offence under section 3, 4, 5 or 6 of the Child Trafficking and Pornography Act 1998; (c) an offence under section 2, 4 or 7 of the Criminal Law (Human Trafficking) Act 2008; (d) an offence under sections 33, 38 or 39 of the Domestic Violence Act 2018; (e) an offence of aiding, abetting, etc. any of the foregoing offences.[115]

8.6 A court, when deciding if the interests of justice require the use of an intermediary, shall have regard to the need to protect the victim from secondary and repeat victimisation, intimidation or retaliation, taking into account (i) the nature and circumstances of the case, and (ii) the personal characteristics of the victim.[116]

8.7 It will be noted that under the revised s. 14 of the 1992 Act, where the trial is for a sexual offence (or other relevant offence), a court may appoint an intermediary for any person under the age of 18 years who is giving evidence through a live television link, provided it is satisfied that the relevant conditions are fulfilled. It may do so on the application of either the prosecution or the defence. A young defendant giving evidence is therefore entitled to have an intermediary just as much as any other young witness. This arrangement is to be commended. In England and Wales, until recently, defendants had no statutory entitled to an intermediary, although the courts had held that they had an inherent power to provide for one in order to ensure a fair trial, and this was the subject of some well-justified criticism.[117]

8.8 Where the trial is for an offence other than a relevant offence, the court may appoint an intermediary for a victim who is under 18 years of age and giving evidence

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115 Criminal Evidence Act 1992, s. 12 as substituted by Criminal Justice (Victims of Crime) Act 2017, s. 30 and amended by Domestic Violence Act 2018, s 44.

116 Criminal Evidence Act 1992, s. 14AA inserted by the Criminal Justice (Victims of Crime) Act 2017, s. 30.

117 Laura Hoyano and Angela Rafferty, "Rationing defence intermediaries under the April 2016 Criminal Practice Direction" [2017] *Criminal Law Review* 93.

through a live television link. No other witness, including a defendant, is entitled to an intermediary in these circumstances. One might question if this distinction is justified, but it is possible that Irish courts, like their English counterparts, may decide that, as part of their inherent power and duty to ensure that accused persons receive a fair trial, they may appoint an intermediary where the justice of the case so demands.

8.9 Section 14 of the 1992 Act, as amended, refers solely to the provision of intermediaries for witnesses under the age of 18 years giving evidence through a live television link. However, this must be read in conjunction with s. 19 of the Act which, as amended, provides that references in ss. 14, 14B, 15 and 16 to a person under the age of 18 years shall include references to a person with a mental disorder within the meaning of s. 5 of the Criminal Justice Act 1993.[118] At first sight, this may appear confusing because s. 5 of the 1993 Act deals with victim impact statements. However, the substituted version of s. 5 in the Criminal Procedure Act 2010 defines "mental disorder" as including mental illness, mental disability, dementia or any disease of the mind. Therefore, a person with a mental illness, intellectual disability or serious learning difficulty, irrespective of age, is entitled to the services of an intermediary on the same basis as a witness under the age of 18 years. There is no formal provision for the use of intermediaries in a case where a witness has a physical disability or a brain injury which might affect their ability to give evidence. Yet there is a strong case to be made for extending the provision of intermediaries for such witnesses. In England in 2017, a man who was rendered immobile as a result of motor neurone disease was able to give evidence at the trial of the person who was charged with having sexually abused him between 1979 and 1981. The man in question was able to give evidence using eye-tracking technology combined with the assistance of a specialist intermediary. The defendant was convicted and later sentenced to four years' imprisonment.[119]

## The role of intermediaries

8.10 Irish law as it now stands provides solely for the use of intermediaries in court and only in certain criminal proceedings at that.[120] Yet, it is widely accepted elsewhere, and would undoubtedly be accepted here, that intermediaries also have an important role at earlier stages of the criminal process. Police interviews with witnesses represent a crucial phase of that process. The nature and quality of the evidence gathered through such interviews will be critical when it comes to deciding if a prosecution should be initiated and, if there is a prosecution, during the trial. Given the special facilities now made available by the Garda Síochána in several parts of the country for interviewing victims in sexual offence cases, the experience of being interviewed is, one hopes, considerably less stressful than giving formal evidence in a courtroom setting. However, some witnesses, notably children and adults with

118 Criminal Evidence Act 1992, s. 14 as amended by Criminal Law (Human Trafficking) (Amendment) Act 2013 and Criminal Justice (Victims of Crime) Act 2017.

119 "Dying man gives evidence with his eyes to help convict vicar who abused him", *The Guardian,* 13 February 2017; "Vicar Cyril Rowe, 78, jailed for sexually abusing choirboy who gave evidence by blinking", *Evening Standard,* 10 March 2017.

120 Criminal Evidence Act 1992, s. 14 (as amended and set out in 8.5 above.

certain disabilities, may still experience communication difficulties that could be greatly alleviated through the assistance of an intermediary. We therefore strongly recommend that intermediaries should also be available to assist with police interviewing, and this can probably be done without the need for new legislation. Further, where at all possible, the person who acts as intermediary during Garda interviews should continue to act as intermediary for the witness in question during trial.

8.11 Cooper and Mattison have described the intermediary's role in England and Wales in these terms:

> "The intermediary's role is to assist the police and the court to communicate with the witness so as to obtain the best-quality evidence from the vulnerable witness. The advice the intermediary gives is underpinned by the intermediary's assessment of the witness's communication needs; an assessment that is performed on an individual, case-by-case basis. It is usually conducted prior to the witness being interviewed by the police, although the intermediary referral can take place later in the proceedings, for example after the interview but before the witness is questioned at court. Based upon the finding of the communication assessment, an intermediary will advise police officers in the case and the advocates at court how best to communicate so that the questions they ask and the answers in reply are understood."[121]

Under this model, the intermediary's role is essentially one of facilitation, rather than being a more active interlocutory role envisaged by the (English) Pigot Report which is also reflected in s. 14 of our Criminal Evidence Act 1992. When drawing up this report, we had the benefit of a consultation with the intermediary service in Northern Ireland and we were impressed by the way in which the system operates there. The general thrust of our recommendations therefore is that provision should be made in this jurisdiction for the use of appropriately qualified intermediaries whose essential role would be to assess the communication needs of vulnerable witnesses and to advise police, advocates and the court as to the steps that are needed to assist such witnesses to give their best evidence.

8.12 The justifications for involving intermediaries at the investigatory stage are not purely instrumental. It is also very much in the interests of justice that a person being interviewed, especially if he or she is either a victim or a suspect, should not be at a disadvantage because of youth or disability. As noted at 8.1 above, the United Nations Convention on the Rights of Persons with Disabilities requires that those to whom it applies are afforded whatever facilities are necessary to enable them to participate as fully as possible in legal proceedings, including at the investigative and other preliminary stages.

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121 P. Cooper and M. Mattison, "Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model" (2017) 21:4 *International Journal of Evidence & Proof* 351 at 354.

8.13 The fundamental objective of using intermediaries during trial is to enable a court to receive the best evidence from a witness who is considered to need such assistance, whether because of youth or disability. The presiding judge remains at all times responsible for the proper conduct of the trial, and both defence and prosecution will be legally represented. Intermediaries, for their part, are specially trained for their task and subject to clear ethical standards in terms of how they discharge their role. It is now well accepted that even very young children or persons with significant disabilities can give valuable, credible and testable evidence when they are questioned in an appropriate way. Justice is served when witnesses, whoever they may be, are able to furnish such evidence and it is only right, indeed imperative, that they should be afforded appropriate assistance where necessary to do so. Persons who abuse very young children, for example, may believe that they can do so with impunity because their victims would not be able to give evidence even if there were a prosecution. However, with the assistance of appropriately qualified experts, a successful prosecution is possible in such a case. In England in 2017, a two-year-old girl was able to give evidence, by way of a recorded interview conducted by a specialist child abuse police officer assisted by a registered intermediary. The intermediary advised on how to question the child who was initially reluctant to engage with the police investigator. The defendant in that case pleaded guilty before the trial began.[122]

## The function of an intermediary

8.14 The sole function of an intermediary is to assist in the communication process, whether between lawyers and witnesses during trial or, earlier, during police interviews. In this respect, their role is somewhat akin to that of an interpreter. The intermediary's loyalty is to the court. Indeed, in some jurisdictions, it has been suggested that intermediaries should be formally classified and treated as officers of the court. On no account, should the intermediary be, or be perceived to be, an advocate or support worker acting on behalf of the person being assisted. For this reason alone, it is crucially important that intermediaries have proper training so that they are fully aware of the nature of the trial process, the constitutional principles according to which trials must be conducted, the rules of evidence, the proper role of advocates and judges and, crucially, their own role. In England and Wales, s. 29(7) of the Youth Justice and Criminal Evidence Act 1999 provides that an intermediary may be guilty of perjury on the same basis as a person sworn as an interpreter in judicial proceedings. A similar provision might be included in any new perjury legislation introduced in this jurisdiction.

8.15 The wording of section 14 of the Criminal Evidence 1992 (set out in 8.5 above) suggests that the intermediary will be directly involved in questioning a witness in the sense that a court may direct that "any questions to be put to a witness be put through an intermediary." Lawyers representing the parties would, of course, decide what the questions should be, but the intermediary would put the questions, phrasing them in an appropriate way. That, at any rate, is the impression to be gained from the

122 "Two-year-old girl gives evidence in UK abuse case", *The Guardian,* 10 October 2017.

wording of the section. But this is not the only way in which an intermediary might assist during trial. In Northern Ireland, for example, the intermediary has more of a preparatory role. There, the registered intermediary conducts an assessment of the communication needs of a witness or defendant and determines the best means for the person in question to communicate. The intermediary then advises the police, legal representatives or the court, as appropriate, of those needs. Further, and very importantly, the intermediary advises on how best to communicate with the vulnerable person in the particular setting in which the questioning is to occur, whether a police station or a court. Northern Ireland, like England and Wales, has a system of ground rules hearings. At such a hearing, the recommendations of the intermediary are discussed and considered. However, at the trial itself, the questioning is still conducted by the relevant lawyer, but in accordance with the recommendations of the intermediary and, where relevant, in accordance with directions given at the ground rules hearing. The intermediary is usually present, but does not intervene unless he or she considers it necessary to do so. This seems like a more effective and acceptable model than one in which the intermediary is actively involved in putting questions to a witness at trial. The essential structure of the trial process remains intact, but both lawyers and judges have the benefit of expert advice in advance as to the most appropriate way of phrasing questions. Having said this, we do not discount the possibility that, in certain circumstances, it might be appropriate or desirable for an intermediary to play a more active role during the questioning of a witness, as envisaged by s. 14 of the Criminal Evidence Act 1992. We therefore recommend the retention of this provision.

8.16 Any necessary arrangements for the appointment of an intermediary and the role of the intermediary during trial should, where at all possible, be made at a preliminary trial hearing. However, the provision of intermediary services need not await the introduction of legislation providing for preliminary trial hearings.

## Recruitment and training of intermediaries

8.17 An intermediary is typically a professional speech therapist, clinical psychologist, social worker or occupational therapist who has significance experience and expertise in dealing with communication problems encountered by children or persons with intellectual or physical disability. The precise specialism required will vary from one case to another. Under s. 14 of the Criminal Evidence Act 1992, an intermediary must be appointed by the court and be a person who, in its opinion, is competent to act as such. Needless to say, a court will be relying on the recommendations and submissions of the parties in order to determine the kind of professional who would be most suitable and qualified to act as an intermediary in a given case. This should be done at a preliminary trial hearing of the kind recommended in Chapter 5 of this Report, so that an appropriately trained and qualified intermediary will be available as soon as needed at the trial. Indeed, it is desirable that, prior to the beginning of a trial, the appointed intermediary, having assessed the witness at that point, should be in a position to advise the court and counsel as to any communication difficulties the witness has and as to any special

measures in terms, for example, as to how questions should be phrased, in order to secure the best evidence from the witness in question.

8.18 If, as we recommend, intermediaries should also be available for police interviews, they can also be called upon by the relevant investigator to assist for that purpose.

8.19 In any event, it is essential that there should be a register of qualified intermediaries who will be persons with the appropriate professional qualifications who have undergone a prescribed programme of training. With a well-established system of intermediaries now operating in our neighbouring jurisdictions, it should be possible to call upon their expertise and experience in drawing up a training programme and assessing candidates for their suitability to act as intermediaries.

8.20 A training programme should, in addition to providing instruction on the more technical aspects of the intermediary's functions, emphasise the importance of impartiality and objectivity in the discharge of those functions. As already stated, the intermediary's sole loyalty must be to the court and not to any party or witness. The essential purpose of a criminal trial is to discover the truth, in so far as that can be achieved in accordance with due process. Intermediaries can play a vital role in the truth discovery process by assisting witnesses to understand questions put to them and helping to elucidate their answers. In England and Wales, persons seeking to become registered intermediaries must complete a five-day training programme (four days of training and one devoted to assessment) which is provided by the Department of Justice. A similar system operates in Northern Ireland. It is strongly recommended that a similar training programme should be established here in Ireland. A steering committee comprising persons with relevant expertise might first be established to determine the content of the training programme and the mode of assessment.

8.21 There should be a formal register of intermediaries and only those whose names are on that register should be eligible to act as intermediaries. Registration should be contingent on having completed the prescribed training course and been assessed at the end of it as qualified and suitable to act as an intermediary. It is not possible at this point to estimate the number of intermediaries likely to be required. We recommend that intermediaries should be available in all areas where criminal trials for sexual offences take place, whether in the District Court, Circuit Court or Central Criminal Court, and also in areas where vulnerable witnesses or suspects are likely to be interviewed by the Gardaí. At the very least, they should be available in those areas with special interview suites. We accept that the scheme may have to be rolled out over a period of time, perhaps in the Dublin courts at first, though it should be extended to all areas as soon as possible thereafter. After its initial introduction, whether on a limited basis or otherwise, the operation of the system should be carefully monitored, and feedback should be sought so as to identify any changes or improvements that might usefully be made.

8.22 A Code of Practice for Intermediaries should also be drawn up so that they, and everyone else involved in the trial process, are absolutely clear about the role of

intermediaries and the standards with which they are expected to comply. It has been suggested that since it may prove difficult to recruit a sufficient number of trained and qualified intermediaries in either this jurisdiction or Northern Ireland, an all-island approach might be adopted. This could mean having a single register or instituting an arrangement whereby those on the register for one Irish jurisdiction would be deemed qualified to act in the other. The Working Group would have no objection to this provided everyone acting as an intermediary in this jurisdiction had undergone the prescribed training here as well. A registered intermediary must be well informed about the constitutional principles and the rules of evidence and procedure within the particular jurisdiction in which he or she is working.

8.23 There was widespread agreement among consultees that far greater use should be made of intermediaries in sexual offence trials in this jurisdiction. The Working Group agrees but it is also conscious that much more must be done in order to establish a cohort of well-qualified and trained intermediaries and to acquaint lawyers, judges and other participants in the trial process with the proper role of the intermediary. As already noted, it is important that a defendant who, whether on account of age or mental disorder, needs an intermediary should be provided with one. It is worth recalling that under s. 4 of the Criminal Law (Insanity) Act 2006, an accused person shall be deemed unfit to be tried if he or she, by reason of mental disorder, is unable to understand the nature or course of the trial so that, for example, he or she cannot understand the evidence. The provision of an intermediary might allow for some persons potentially falling into this category to be tried, although it is not being suggested that it would do so in all such cases, or even perhaps in most cases. But it may assist in some.

8.24 The introduction of intermediaries, as we envisage their role in the trial process, should not meet with any resistance. It is not a question of somebody being interposed between counsel and witness. Rather it is a proposal for the provision of expert advice to legal representatives and the court as to the best and most effective way of questioning a witness. Such an arrangement is quite compatible with the ultimate purpose of a criminal trial, which is to discover the truth in a just and lawful manner. In 2013, by which time intermediaries were well established in the English criminal justice system, the Lord Chief Justice of England and Wales made these remarks:

> "As you will all appreciate, the use of intermediaries is now established. As is so often the case with change, there was much misunderstanding about intermediaries and their functions, and indeed it is not too exaggerated to say that much suspicion about them was engendered. Intermediaries do not interfere with the process of cross-examination. They are not supporters of the witness. They are neutral and independent, offering assistance to the court and responsible to the court. Their presence is designed to assist the judge and advocates and the witness to ensure that they all understand each other. Take a simple little word like "fib". We all think we know what it means. But do we all think it means the same thing? Does it apply to any kind of lie, the deliberate malevolent lie and what is sometimes described as the "white lie", the little lie he told to avoid

> causing umbrage and offence, or does it apply only to deliberate falsehood? Or is it just a refined middle-class word, quite meaningless to many children? If you are not all using the same word, with the same comprehension of its true meaning, misunderstanding and therefore a false impression of what it is that the child witness is seeking to convey, or agree with, is inevitable. Intermediaries perform a valuable function which it is not open to the judge to perform without, at any rate, giving the appearance, if the judge acts entirely on his or her own initiative, of partiality."[123]

8.25 Intermediaries were introduced on a phased basis in England and Wales, starting in 2004 with a pilot scheme covering six areas of England. A few years later an evaluation was undertaken, and its conclusions were generally positive about the operation of the scheme.[124] It found that "almost all those who encountered the work of intermediaries in pathfinder cases expressed a positive opinion of their experience and provided specific examples of their contributions." The use of intermediaries was extended nationally in 2008.[125] By 2016, there were approximately 200 registered intermediaries on the Ministry of Justice register. Requests for the services of an intermediary at that time ran to about 530 a month, and about two-thirds of requests were for complainants in sexual offence cases.[126]

8.26 We have already recommended that there should be a register of qualified intermediaries. This, however, must be supplemented with appropriate administrative back-up. Governance arrangements for the system of intermediaries should be put in place before the system begins to operate on a significant scale.

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123 Lord Judge, "The Evidence of Child Victims: The Next Stage", Law Reform Committee Lecture, 21 November 2013, and reprinted in Lord Judge, *The Safest Shield: Lectures, Speeches and Essays* (Oxford: Hart Publishing, 2015).

124 J. Plotnikoff and R. Woolfson, *The Go-Between: Evaluation of Intermediary Pathfinder Projects* (London: NSPCC/The Nuffield Foundation, 2007). See also the same authors' *Intermediaries in the Criminal Justice System: Improving Communication for Vulnerable Witnesses and Defendants* (Bristol: Polity Press, 2015).

125 Penny Cooper and Michelle Mattison, "Intermediaries, vulnerable people and the quality of evidence: An international comparison of three versions of the English intermediary model" (2017) 21:4 *International Journal of Evidence and Proof* 351.

126 *Ibid.*

## SUMMARY OF RECOMMENDATIONS

- **A cohort of appropriately qualified intermediaries who have undergone a prescribed course of training on the role of intermediaries should be recruited and placed on a register. All intermediaries should have a professional background in speech and language therapy, social work, clinical psychology, occupational therapy or some cognate area.**

- **The task of recruiting and training intermediaries should be undertaken by the Department of Justice and Equality or an appropriate state agency. With well-established systems of intermediaries now operating in our neighbouring jurisdictions, it should be possible to draw upon their experience and expertise in establishing a training programme and assessing persons for their suitability to act as intermediaries.**

- **An adequate number of intermediaries should be appointed on a full-time basis, the precise number depending on the estimated demand for their services throughout the country.**

- **Intermediaries, where needed, should be involved from the earliest stages of the criminal process and, in particular, should be available to assist at Garda interviews of victims, defendants or other potential witnesses who may be vulnerable on account of age or physical or mental disability.**

- **Where at all possible, the same person should serve as intermediary in respect of a particular witness throughout the entire criminal process. An intermediary who has been involved in the Garda interview should continue to function in respect of the witness in question during the trial where one takes place.**

- **The role of the intermediary should essentially be an advisory one. Having assessed the communication needs of a person being interviewed by An Garda Síochána or about to testify as a witness, as the case may be, the intermediary would advise legal representatives and the court as to the most appropriate way of questioning the witness so as to enable the witness to give their best evidence.**

- **Intermediaries may nonetheless, on occasion, be called upon to play a more active role at the questioning of a witness as envisaged by s. 14 of the Criminal Evidence Act 1992. We therefore recommend that this section be retained.**

- **An administrative structure should be put in place to maintain a register of qualified intermediaries, to arrange for the recruitment of additional ones where needed, and to arrange for the assignment of intermediaries, as required and on a case-by-case basis, for Garda interviews and criminal trials.**

- **In the event that it proves difficult to recruit a sufficient number of appropriately qualified intermediaries within this jurisdiction, consideration should be given to**

**entering into discussion with the relevant Northern Ireland authorities with a view to having a joint register of intermediaries. However, everyone acting as an intermediary in this jurisdiction would be required to complete a training course on the criminal process in this jurisdiction and the role of intermediaries within it.**

# CHAPTER 9: REDUCING DELAY

9.1 The right to trial in due course of law guaranteed by Article 38.1 of the Constitution encompasses a right to trial with reasonable expedition, which is more or less equivalent to the right to a speedy trial expressly guaranteed by the Sixth Amendment to the United States Constitution. In Ireland, the right to trial with reasonable expedition has resulted from judicial interpretations of the Constitution. There is already, of course, the longstanding common-law maxim that justice delayed is justice denied. Both the European Convention on Human Rights and the International Covenant on Civil and Political Rights expressly protect the right to trial within a reasonable time. Article 6(1) of the European Convention provides in part:

> "In the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law."

Article 14(3) of the International Covenant on Civil and Political Rights provides in part:

> "In the determination of any criminal charge against him, everyone shall be entitled to the following minimum guarantees, in full equality:
>
> (a) To be informed promptly and in detail in a language which he understands of the nature and cause of the charge against him;
> (b) To have adequate time and facilities for the preparation of his defence and to communicate with counsel of his own choosing;
> (c) To be tried without undue delay."

9.2 Further, and importantly in the context of responding to the needs of vulnerable witnesses, the United Nations Convention on the Rights of the Child Art. 40 provides that every child (a person under 18 years of age), alleged or accused of having committed an offence is entitled to certain minimum guarantees, including:

> "to have the matter determined without delay by a competent, independent and impartial authority or judicial body in a fair hearing according to law, in the presence of legal or other appropriate assistance and, unless it is considered not to be in the best interest of the child, in particular, taking into account his or her age or situation, his or her parents or legal guardians."

As we shall see, Irish courts have repeatedly stressed the importance of expedition in the conduct of criminal proceedings against child defendants.

9.3 All of the constitutional and international human rights principles so far mentioned deal with the right of an accused person to trial within a reasonable time, and time begins to run as soon as the person is charged or officially made aware of the allegation. It goes without saying that a victim has an equally strong interest in having an alleged offence investigated, prosecuted and tried with the minimum of delay.

Both defendants and victims (and perhaps other witnesses) can suffer as a result of unwarranted delay. The longer a person is anticipating a trial at which he or she is either the defendant or a key witness, the more stressful the entire experience becomes. Such a person is left in a prolonged state of uncertainty and cannot make any definite plans to get on with life until the trial process is complete. Further difficulties may also ensue. For example, an important witness may become unavailable or some material evidence may get lost. The longer the interval between the alleged offence and the trial, the more difficult it may be for witnesses, including defendants and victims, to recall details associated with the offence. These are important considerations in all cases, but they are especially significant for witnesses who are vulnerable on account of youth, old age, illness or disability.

9.4 Irish courts have consistently emphasised the importance of expedition in criminal proceedings involving young defendants. This should apply at all stages of the criminal process, from investigation to trial. The Beijing Rules (the United Nations Standard Minimum Rules for the Administration of Juvenile Justice, adopted in 1985) provide that a criminal case against a child "shall from the outset be handled expeditiously and without any unnecessary delay". The comment on this provision states:

> "The speedy conduct of formal procedures in juvenile cases is a paramount concern. Otherwise whatever good is achieved by the procedure and the disposition is at risk. As time passes, the juvenile will find it increasingly difficult, if not impossible, to relate the procedure and disposition to the offence, both intellectually and psychologically."

The Irish High Court has likewise said:

> "It is no secret that persons in their late teenage years have particular vulnerabilities. The vulnerabilities can be compounded by difficult or deprived family or social circumstances, and by a variety of other reasons. The interests of the community will not be served by subjecting such persons to substantial delay in confronting them with complaints of criminal activity made against them. The interests of the community will surely be better served by efficient action on the part of the State authorities designed to ensure that young persons acquitted of criminal offences may be enabled to resume normal life and those convicted may be dealt with in such a manner as to reduce the risk to the community of further criminal conduct."[127]

The Supreme Court has also stressed the special obligation on State authorities to investigate and prosecute allegations of criminal conduct against children as expeditiously as possible.[128] The same principle doubtless applies to persons with mental illness or learning difficulties.

127 *Jackson v DPP* [2004] IEHC 380.
128 *B.F. v DPP* [2001] 1 I.R. 656; *Cullen v DPP* [2014] IESC 59.

9.5 As already noted, victims as well as defendants have a strong and legitimate interest in the speedy conduct of criminal proceedings. The EU Directive on Victims' Rights (Art. 20), which deals the protection of victims during criminal investigations provides in part:

> "Without prejudice to the rights of the defence and in accordance with rules of judicial discretion, Member States shall ensure that during criminal investigations.
>
> (a) Interviews of victims are conducted without unjustified delay after the complaint with regard to a criminal offence has been made to a competent authority."

It is to be inferred that all subsequent steps in the process should also be taken without unjustified delay.

9.6 It is important to distinguish at the outset between, on the one hand, delay in the sense of unwarranted, unnecessary or unjustified delay and, on the other, various periods of time that must, of necessity, elapse in order for an alleged offence to be properly investigated. Investigations of so-called historic child sexual abuse can be particularly time-consuming, especially where several potential witnesses must be tracked down. By the time of the investigation, those persons may be living in any part of the world. Further, in such a case, the accused, the victim and possibly other witnesses may have to be interviewed on more than one occasion as further evidence or information comes to light.

9.7 Our concern, therefore, is with avoidable delay. Such delay may occur at various stages in the criminal process, most notably the following:

- Investigating the offence once it has been reported to the Gardaí.
- Forwarding a file on the matter to the Director of Public Prosecutions.
- Reaching a decision within the office of the Director of Public Prosecutions as to whether one or more charges should be brought.
- Arresting the accused and bringing him before the District Court.
- Preparing and serving the book of evidence
- Fixing a date for the commencement of the trial
- Adjournment of the trial.

While it is undoubtedly desirable, in the interests of the victim, the defendant and other affected persons that the trial should proceed as quickly as possible after the book of evidence has been served and the accused has been sent forward to the relevant trial court, it is also important that accused persons should have adequate time and facilities to prepare their defence. This, indeed, is acknowledged in Article 14(3) of the International Covenant on Civil and Political Rights (quoted at 9.1 above) which requires that accused persons should have adequate time and facilities to prepare their defence and to communicate with counsel of their own choosing. Having said that, we are not aware of any such problem in Ireland right now. Rather

the problem is with the length of time that can elapse between the initial complaint and the eventual disposal of the charge where a prosecution is brought.

9.8 Until recently, one significant cause of delay, especially in historic child sexual abuse cases, was that an accused person might bring judicial review proceedings to have the trial prohibited, usually on the grounds of either complainant or prosecution delay. Pre-trial judicial review proceedings of this nature were known to add as much as three or four years to the interval between the reporting of an offence and the eventual trial, assuming a trial was permitted to proceed.[129]

9.9 However, the situation has improved considerably in recent years. As already noted in Chapter 5, the Superior Courts have stressed that it is only in exceptional circumstances that a trial should be prohibited by way of judicial review, irrespective of the ground on which prohibition is sought. (In the vast majority of cases, the ground will be delay, loss of evidence or pre-trial publicity). The responsibility for ensuring that an accused person receives a fair trial rests primarily with the trial judge. As the Supreme Court said in *Byrne v DPP:*[130]

> "The constitutional right, the infringement of which is said to ground an applicant's entitlement to prohibit a trial, is the right to fair trial on a criminal charge guaranteed by Articles 38 and 34 of the Constitution. The manner in which the Constitution contemplates that a fair trial is normally guaranteed is through the trial and, if necessary, appeal processes of the courts established under the Constitution. The primary onus of ensuring that that right is vindicated lies on the court of trial, which will itself be a court established under the Constitution and obliged to administer justice pursuant to Article 34. It is, in my view, therefore, entirely consistent with the constitutional order to observe that it will only be in exceptional cases that superior courts should intervene and prohibit a trial, particularly on the basis that evidence is sought to be adduced (in the case of video stills) or is not available (in the case of the CCTV evidence itself)."

9.10 Where prohibition is sought on account of complainant delay, the test is whether the accused person has satisfied the court on the balance of probabilities that there is a real and unavoidable risk that he or she will not receive a fair trial. It was so decided by the Supreme Court in *S.H. v DPP*[131] although the court in that case also accepted that "wholly exceptional circumstances" might exist which would render it unfair or unjust to put the person on trial. Consequently, a person seeking prohibition on account of complainant delay has a heavy onus to discharge. It is now generally accepted, however, that this matter is now best dealt with by the trial judge. As the High Court has said:

> "The point of the decision in *S.H.* and the authorities that followed is that the difficulties caused to a defendant in cases of old allegations (and I do accept that

129 See, for example, *S.H. v DPP* [2006] 3 I.R. 575 where the judicial review proceedings added about 4½ years to the overall length of the proceedings.

130 [2011] 1 I.R. 346 at 356

131 [2006] 3 I.R. 575.

> there can be very real difficulties) are best dealt with in the court of trial. Trial judges are now accustomed to dealing with such cases and using such powers as are necessary to prevent injustice to accused persons. It is perfectly clear that a trial judge is not restricted to simply giving warnings to the jury but may, where necessary in exceptional cases, withdraw the case from the jury on the basis that the difficulties for the defence are such that it is not just to proceed. Such a decision, in the normal course of events, will often be better taken in light of the evidence as actually given rather than as speculated about in judicial review proceedings."[132]

The Supreme Court adopted a similar approach in *People (DPP) v C.C.*[133] There are now very few applications for restraint of trial by way of judicial review and the number may be expected to decline even further as a result of the case law just mentioned. The length of time taken to hear and determine such judicial review applications as are brought has also shortened considerably.

9.11 As we have already stated in Chapter 5, the Department of Justice and Equality may wish to consult further on the question of whether applications for prohibition of trial should be included among the matters to be determined at preliminary trial hearings. As we there noted, such applications are now dealt with by way of judicial review and the superior courts have developed a coherent set of principles to be applied in the determination of such applications. This is undoubtedly a factor to which the Department will need to have regard before deciding on the range of issues that may be decided at preliminary hearings.

## Sentence discount for guilty plea

9.12 Criminal proceedings are obviously expedited where the accused pleads guilty at the first reasonable opportunity, thereby avoiding the need for a trial or for fixing of a trial date. The advantages of a guilty plea, for the victim as well as for the criminal justice system, are discussed below. However, it is important that a victim should not be disadvantaged or feel excluded as a result of a guilty plea to a sexual offence being tendered or accepted. A victim may, for example, feel deprived of an opportunity to have a meaningful role in the process where there is no trial. In this regard, we point to the provisions of the Criminal Justice Act 1993 which allow for victim impact statements.[134] This Act (s. 5) provides that, when imposing sentence for a sexual offence,

> "… a court shall take into account, and may, where necessary, receive evidence or submissions concerning any effect (whether long-term of otherwise) of the offence on the person in respect of whom the offence was committed."

It further provides:

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132 P.B. v DPP [2013] IEHC 401, para. 59.
133 [2019] IESC 94.
134 Criminal Justice Act 1993, s. 5 as substituted by Criminal Procedure Act 2010, s. 4

> "When imposing sentence for an offence to which this section applies [and that includes sexual offences], a court shall, upon application by the person in respect of whom such offence was committed, hear the evidence of the person in respect of whom the offence was committed as to the effect of the offence on such person."

The victim of a sexual offence therefore has a statutory right to give evidence as to the effect of the offence on her or him, and this applies irrespective of whether the accused has been convicted following a trial or a guilty plea. The Criminal Justice (Victims of Crime) Act 2017 (s. 31), extends the relevant section of the Criminal Justice Act 1993 by specifying that victim impact evidence may be given where any natural person has been the victim of an offence which directly caused harm, including physical, mental or emotional harm, or economic loss.

9.13 It may happen, in sexual offence cases as in many others, that an accused person will offer to plead guilty to a less serious offence than that charged. Where this happens, it is for the Director of Public Prosecutions to decide if that offer should be accepted. However, it is now the policy of the Director, in fulfilment of the requirements of the EU Victims Directive, to consult with the victim before deciding to accept or reject the offer of a plea to a lesser offence. We commend that practice.

9.14 Overall, there is both a high conviction rate and a high guilty plea rate for serious offences in this jurisdiction. The most recent Annual Report of the Director of Public Prosecutions sets out the results of prosecutions on indictment which were commenced in the years 2015, 2016 and 2017.[135] Of the 2352 cases for 2017 that were completed by the time the Report was compiled, 2246 (96%) resulted in a conviction,[136] while 106 (4%) in an acquittal, either by a jury or by direction of the trial judge).

9.15 The percentage of verdicts resulting from guilty pleas varies from one offence to another. For instance, in 2017 all convictions in the Circuit Court for drug offences and child pornography offences resulted from guilty pleas. Of the 120 convictions in the Circuit Court for sexual offences that year, 106 (88%) resulted from a plea, and 14 (12%) from a jury verdict. There were 11 acquittals, either by the jury or by direction of the trial judge.

9.16 In the case of rape which, like aggravated sexual assault, is tried in the Central Criminal Court, there were 116 prosecutions on indictment in 2017, more or less the same as in the two previous years. By the time the Director's Report was compiled, 76 of these were still awaiting a hearing. Of the remaining 40, the outcomes were as follows:

| | |
|---|---|
| Conviction by jury | 10 (25%) |

135 Director of Public Prosecutions, *Annual Report 2018* (Dublin, 2019), Part 2.

136 A case is treated as resulting in a conviction where there was a conviction on at least one of the charges in the case.

| | |
|---|---|
| Conviction following guilty plea | 16 (40%) |
| Conviction on lesser charge | 5 (13%) |
| Acquittal by jury | 5 (13%) |
| Acquittal by direction | 1 (2.5%) |
| Other disposals | 3 (7.5%) |

There was therefore an overall conviction rate of 78% for this cohort of cases (namely those prosecuted on indictment in 2017 which had been completed by the time the Annual Report of the Director of Public Prosecutions for 2018 was compiled).

9.17 Most common-law jurisdictions nowadays have high rates of guilty pleas and Ireland is clearly no exception in this regard. A guilty plea is mutually advantageous to both the prosecution and the defence. It relieves the prosecution of having to prove the charge beyond a reasonable doubt, while the defendant can expect to be rewarded with a sentence discount which will usually be significant if there has been an early admission of responsibility followed by a guilty plea. Needless to say, a guilty plea must always be genuinely voluntary, and entered with full knowledge of all the relevant facts and the possible consequences.

9.18 There are at least three justifications for treating guilty pleas as mitigating. The first is systemic in nature; guilty pleas save a great deal of time and court resources. In fact, it is often said, probably correctly, that the criminal justice system would break down if everyone charged with an offence opted to contest the charge by way of a trial. The second justification, which is highly relevant in the present context, is that a guilty plea has a particular value in sexual offence cases (and also perhaps in other cases such as assaults, robberies and burglaries where victims have had a traumatic experience). A plea saves the victim from having to give evidence and undergo cross-examination which, no matter how sensitively handled, can be stressful and traumatic. This justification was expressly recognised by the Supreme Court in *People (DPP) v Tiernan,*[137]which remains a leading authority on sentencing for rape. The third justification is that a guilty plea *may* be an indication of remorse. Needless to say, this will not be invariably true, as many guilty pleas are tactical. However, where a plea does strongly suggest remorse, it can be accorded some extra weight unless mitigation is granted for remorse as a separate factor, as sometimes happens.

9.19 An accused person may therefore be rewarded by way of sentence reduction for pleading guilty, but he or she may never be penalised for having pleaded not guilty and put the prosecution on proof of his or her guilt. Article 38.1 of the Constitution provides that no person shall be tried on any criminal charge save in due course of law. This implicitly confers many more specific entitlements such as the presumption of innocence (which is expressly protected in any event under Article 6 of the European Convention on Human Rights) and that, in turn, infers a right to have the charge proved to the criminal standard of proof by the prosecution. A judge who imposed a higher sentence on a convicted person for having pleaded not guilty or

137 [1988] I.R. 250.

who even gave the impression of doing so would be committing an error of principle which would justify an appeal against sentence.

9.20 As a general rule, the earlier a guilty plea is entered the more credit it deserves. This is a long-standing common-law principle, but it is also enshrined in the Criminal Justice Act 1999, section 29(1) of which provides:

> "In determining what sentence to pass on a person who has pleaded guilty to an offence, other than an offence for which the sentence is fixed by law, the court, if it considers it appropriate to do so, shall take into account – (a) the stage in the proceedings for the offence at which the person indicated an intention to plead guilty, and (b) the circumstances in which this indication was given."

9.21 In terms of reducing delay, the advantages of an early admission of guilt followed by a guilty plea are well illustrated by the recent case of *People (DPP) v Tiso.*[138] The accused in that case was charged with a number of offences, including rape, aggravated sexual assault and assault causing harm resulting from a very serious attack perpetrated against a woman in the vicinity of a Dublin night club on 18 January 2016. What happened thereafter is set out in the following passage from the judgment of the Court of Appeal which dealt with an appeal against severity of sentence:

> "The value of a guilty plea is well-known in that it saves time and resources for all involved, but more importantly ensures that victims do not have to go through the secondary trauma of a full trial. Accordingly, the timing of a guilty plea is significant when determining the level of mitigation to be afforded to an individual who so pleads. What occurred here was highly unusual with the solicitor for the applicant making contact at a very early stage to confirm that there would be a plea of guilty and then that being followed up by the entry of signed pleas of guilty in the District Court on 26th April 2016 which were then confirmed at the first appearance in the Central Criminal Court on 7th June 2016. Eight days passed between the event itself and the indication to the Gardaí that a guilty plea would be lodged. Three months later, Mr Tiso entered his signed pleas of guilty before the District Court. Just over a month later, these pleas were confirmed in the Central Criminal Court. The sentencing hearing itself took place on 1st November 2016. The case, outside of this sentence appeal, was complete within ten months."[139]

This case illustrates the degree of expedition with which a case involving a serious sexual offence can be processed where there is a prompt admission of guilt followed by a signed plea of guilty in the District Court, this plea being maintained in the trial court. It must however be recorded that it was also a case where there was CCTV footage linking the accused to the offence. In many other cases, no such evidence will be available.

138 [2018] IECA 377.
139 [2018] IECA 377, para. 12.

9.22 In England and Wales, a guideline issued by the Sentencing Council sets out the discounts to be granted for a guilty plea, depending primarily on the stage at which it is entered. There is a discount of one-third where the defendant pleads guilty at the first opportunity, but this falls to one-tenth where the plea is not entered until immediately before the trial begins. Where the plea is entered after the trial begins, the judge has a discretion to award a discount up to 10 per cent.[140] No such sentencing guidelines exist in Ireland, but the discount levels are essentially similar to those granted in England and Wales. Here, the Court of Appeal has said that a guilty plea will ordinarily merit a reduction of 10 to 30 per cent, and that the typically going rate is 25 per cent.

9.23 The decision on whether or not to plead guilty plea must always be made by the accused person him/herself. Legal representatives may, of course, advise an accused of the options in that regard, but the decision itself must always be that of the accused. It would clearly be helpful if legal representatives were in a position to offer more definitive advice than is now possible as to the likely sentences (or, at least, sentence ranges) in the event of a guilty verdict following trial and in the event of a guilty plea. This could be achieved by having a formal sentencing guideline on discounts for a plea, similar to that produced by the Sentencing Council for England and Wales. We note that the Judicial Council Act 2019 provides for the establishment of a Sentencing Guidelines and Information Committee which will be tasked with drafting sentencing guidelines for submission to the Board of the Council and which may then be adopted by the Council itself.[141]

9.24 Section 91(1) of the Judicial Council Act 2019 provides that sentencing guidelines "may relate to sentencing generally or to sentences in respect of a particular offence, a particular category of offence or a particular category of offender." This obviously allows for the development of generic guidelines on matters such as the discount for a guilty plea as well as guidelines for the sentencing of particular offences. We recommend that the Sentencing Guidelines and Information Committee consider giving priority to a guideline on discounts for guilty pleas. We note that the Supreme Court has recently issued an important judgment on sentencing for rape, setting out appropriate headline sentences, in terms of sentence ranges.[142] The range to which a specific offence is to be allocated depends on its nature and circumstances. It would clearly be helpful if the Sentencing Guidelines and Information Committee were to give some priority to developing guidelines for other sexual offences.

## Further measures to reduce delay

9.25 According to the most recent Annual Report of the Courts Service, for cases prosecuted in the Central Criminal Court, the average length of time from the receipt of a return for trial from the District Court until the final order in the case was 382

140 Sentencing Council, *Reduction in Sentence for a Guilty Plea: Definitive Guideline* (London, 2017).

141 For an analysis of the relevant provisions of the 2019 Act, see Tom O'Malley, "Sentencing Guidelines, Legal Transplants and an Uncertain Future" (2019) 29:4 *Irish Criminal Law Journal* 94.

142 *People (DPP) v F.E.*[2019] IESC 85.

days in 2018, a substantial reduction from 542 days in 2017. For murder and rape trials, the interval between the first listing of the case before the Central Criminal Court on return for trial from the District Court and the trial date was 11 months in 2018, compared to 11.5 months in 2017.

9.26 The time lags in the Circuit Court were considerably longer. In 2018, the interval between the receipt of a return for trial and the final order was 547 days in 2018, compared with 404 days in 2017. However, these are average figures for all offences, and not just for sexual offences.

9.27 Obviously, any steps that can be taken to reduce waiting times for trials are to be encouraged, but regard must be had to the availability of the necessary resources in terms of judges and court facilities. From some limited research which we have undertaken, it appears that one common problem is that cases sometimes cannot, for one reason or another, begin on the scheduled commencement date and must therefore be adjourned. Because of heavy court lists, an adjourned trial may not recommence for several months, or sometimes up to a year, after the date on which it was due to begin. Every possible effort must be made to address this problem, given the added stress which such adjournments can cause to victims, defendants, witnesses and others.

9.28 This consideration, in turn, leads us to reiterate our strong recommendation in Chapter 5 for the introduction of preliminary trial hearings. These may not resolve all the problems that create the need for adjournments, but they should lead to a considerable improvement. One important function of such a hearing would be to determine if the case is, in fact, ready to proceed and to allow for directions to be given that any outstanding matters relating, for example, to disclosure should be addressed as a matter of urgency.

## Appointment of additional judges

9.29 Some of our consultees have suggested that the best way of resolving delay-related problems is to appoint or allocate additional judges to the criminal courts. We do not discount the possibility that additional judges may be needed, but we would caution against assuming that this would be a panacea to all the problems connected with delay. At present there are usually four or five High Court judges assigned to the Central Criminal Court in Dublin which means that, on any given day, there are four or five separate courts sitting in the Criminal Courts of Justice (CCJ). There is also, as a rule, a Central Criminal Court sitting in Cork or elsewhere in Munster. As noted in Chapter 2, there are now excellent facilities available in the CCJ and in some other courthouses (though not in all) throughout the country for victims, jurors and others. This standard of accommodation should be maintained, as should the current level of support for victims provided by V-SAC and other organisations in the CCJ and elsewhere. Again, we stress that we are not by any means opposed to increasing the number of judges in the criminal courts, if they are needed. But we recommend that, before any steps are taken in this regard, there should be a careful assessment of the

likely impact on available accommodation, services and facilities, for victims in particular. Preliminary trial hearings should result in fewer adjournments of trials. Should this materialise, the relevant authorities will be in a better position to assess the extent to which the appointment or allocation of additional judges to the criminal courts is likely to expedite trials.

## Further research on processing of sexual offence cases

9.30 In this chapter, we have concentrated mainly on delays in processing sexual offence cases within the courts system. Further research is needed on possible delays at earlier stages of the process, from the time at which the initial complaint is made to the Gardaí until there has been a return for trial to the Central Criminal Court or the Circuit Court, as the case may be. We recommend that the Department of Justice and Equality should periodically undertake or commission a review of the processing of cases from the time of the initial complaint until the conclusion of the process. We acknowledge that the DPP usually proceeds very expeditiously in issuing directions as to prosecution once a file has been received. In 2018, for example, directions were issued within 4 weeks in 70% of cases and within three months in further 19% of cases.[143] (These relate to figures for all cases)

143 Director of Public Prosecutions, *Annual Report 2018* (Dublin, 2019), p. 20.

# SUMMARY OF RECOMMENDATIONS

- **The Sentencing Guidelines and Information Committee, established under the terms of the Judicial Council Act 2019, should consider giving priority to drawing up a guideline on discounts for guilty pleas and also to sentencing guidelines for sexual offences, especially those offences in respect of which there are no judicially developed guidelines.**

- **A system of preliminary trial hearings should be established, as already recommended in Chapter 5. The governing legislation should allow, to the greatest extent practicable, for issues that may contribute to delay in the commencement of trials or to the adjournment of trials to be addressed at such hearings.**

- **Further empirical research should be undertaken on the processing of sexual offence cases from the time at which a complaint is made until the case comes on for trial, in those cases where a prosecution is initiated. The purpose of this research would be to identify any problems that may contribute to delay and any measures that might be adopted to address those problems.**

- **Any proposal for the appointment or allocation of additional judges to the criminal courts should be preceded by an assessment of the impact which this would have on the court accommodation and facilities that are available, or that would be required, for victims and other persons participating in or attending sexual offence trials.**

# CHAPTER 10: TRAINING

10.1 It is now widely acknowledged that criminal justice professionals who deal with victims of sexual crime need special training in order to gain a deeper and more realistic understanding of victims' experience, as well as an appreciation of the fears and concerns that victims may have as the criminal process unfolds. The trial, where one occurs, is obviously a central and critical moment in that process, and one that can be particularly stressful, at times traumatic, for key witnesses and especially for victims. The treatment of victims in sexual offence trials has undoubtedly improved in recent years, both in terms of the facilities made available to them in court and the manner in which evidence is elicited from them during trial. However, the justice and integrity of the criminal process depends on its capacity to elicit the best evidence, meaning evidence that is truthful and comprehensive, and that accurately recounts the experience of the person who is giving it. Some witnesses who are particularly vulnerable by virtue of youth, disability or some other factor may have difficulty in giving their best evidence unless those who are questioning them understand the problems the witnesses in question may have in this regard. Many difficulties encountered by children and persons with disabilities while testifying in criminal proceedings can be addressed by adopting measures designed to ensure, as far as possible, that they understand the questions put to them and are able to give truthful and coherent answers.

10.2 However, we wish to stress that training should not be confined to understanding and addressing the difficulties encountered by children and persons with disabilities. Judges and lawyers dealing with victims of sexual crime must be sensitive to the trauma experienced by all victims of sexual violence, irrespective of age, gender or capacity. Many (perhaps most) victims will still be experiencing such trauma when they report the offence to the Gardaí and when they are being interviewed about it. Rape myths, meaning erroneous beliefs or assumptions that sexual acts must have been, or probably were, consensual if they occurred in certain environments or within the context of a pre-existing relationship, continue to exist. Everyone dealing with victims of sexual crime should be acutely aware of such myths and of their own susceptibility to be influenced by them. Training provided for legal professionals should include a module on rape myths and on the emotional trauma experienced by victims of sexual crime. Training should also stress, as the courts have repeatedly held, that the manner in which a person dresses or the fact that she or he accepts an invitation to visit somebody else's dwelling is not under any circumstances to be treated as indicating consent to sexual activity.

10.3 The adoption of special measures to assist witnesses, such as children and persons with disabilities, who may encounter particular difficulties when testifying need not detract from the essential structure and purpose of the trial process, nor from the constitutional values and imperatives underpinning it. These imperatives include, of course, the requirement that the prosecution bear the burden of proving the accused person's guilt beyond a reasonable doubt and that the defence have a full opportunity to challenge the prosecution case. Specialist training for lawyers and judges must

therefore create an awareness of the difficulties vulnerable witnesses may experience while giving evidence, and it must equip lawyers with the skills necessary to elicit the best evidence in these circumstances.

10.4 There is a very extensive international literature on the difficulties encountered by children, in particular, when required to give evidence in a conventional courtroom setting and in accordance with standard trial procedures.[144] Similar difficulties may be experienced by adults with certain disabilities. It is now well accepted, for example, that children are most likely to give reliable evidence in response to clear, concise and uncomplicated questions phrased in ordinary language which they understand. Tag questions should be avoided to the greatest extent possible. A tag question consists of a statement, followed by an interrogative, e.g. "But you were quite happy to go and visit him, weren't you?" Children, and especially young children, may be reluctant to disagree with an adult, all the more so when the adult appears to be in a position of authority. They may therefore acquiesce in such statements, even if they do not agree with them. Long or complicated questions and double negatives should be avoided, and care should be taken to identify clearly in each question the person or place, as the case may be, to which reference is being made. Following a recommendation by the English Court of Appeal in *R v Wills,*[145] the Judicial College of England and Wales issued the *Judicial College Checklist: Young Witness Cases* in January 2012, setting out best practice when dealing with child witnesses. As summarised by Keane, the directions that may be issued to advocates for both defence and prosecution include:

> "[They should] adapt questions to the child's developmental stage, enabling the child's best evidence; ask short, simple questions (one idea at a time); follow a logical sequence; speak slowly, pause and allow a child enough time to process questions; allow a child a full opportunity to answer; avoid questions that may produce unreliable answers (such as tag questions)… avoid allegations of misconduct without reasonable grounds."[146]

The questioning of young and vulnerable witnesses during examination-in-chief and cross-examination is just one area in which advocates can benefit from training (and we appreciate that some will already have developed significant skills in this respect). Lawyers must also be aware of other matters such as the manner in which children may respond to the experience of sexual abuse, and the reasons for their reluctance to disclose it, at least in its immediate aftermath. As set out at the end of this chapter, we recommend the establishment of an implementation committee with the appropriate

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144 See, for example, A. Keane, "Towards a principled approach to the cross-examination of vulnerable witnesses" [2012] Crim. L.R. 407; L. Ellison, *The Adversarial Process and the Vulnerable Witness* (Oxford University Press, 2001); J.E.B. Myers, K.J. Saywitz and G.S. Goodman, "Psychological research on children as witnesses: Practical recommendations for forensic interviews and courtroom testimony" (1996) 28 *Pacific Law Journal* 3; D.R.A. Caruso, "'I don't want to play follow the leader': Three proposals for the reform of the cross-examination of children" [2011] 2 *Journal of Commonwealth Criminal Law* 254.

145 [2011] EWCA Crim. 1938; [2012] 1 Cr. App. R. 2 at 16.

146 A. Keane, "Towards a principled approach to the cross-examination of vulnerable witnesses" [2012] Crim. L.R. 407.

expertise to develop a training programme. One key function of that committee will be to identify the more specific issues on which training should be provided.

10.5 We have already recommended in Chapter 8 that more extensive and effective provision be made for the use of intermediaries in cases involving children and adults who have learning difficulties, mental illness and certain physical disabilities. A training programme should include a segment on the role of intermediaries and how their assistance can be most effectively invoked in order to help such witnesses to give their best evidence in a manner that is as least stressful as possible.

10.6 The provision of training is no longer an option in view of the obligations imposed by Article 25 of the EU Victims' Rights Directive which provides:

1. Member states shall ensure that officials likely to come into contact with victims, such as police officers and court staff, receive both general and specialist training to a level appropriate to their contact with victims to increase their awareness of the needs of victims and to enable them to deal with victims in an impartial, respectful and professional manner.

2. Without prejudice to judicial independence and differences in judicial organisation across the Union, Member States shall request that those responsible for the training of judges and prosecutors involved in criminal proceedings make available both general and specialist training to increase the awareness of judges and prosecutors of the needs of victims.

3. With due respect to the independence of the legal profession, Member States shall recommend that those responsible for the training of lawyers make available both general and specialist training to increase the awareness of lawyers of the needs of victims.

4. Through their public services or by their funding of victim support organisations, Member States shall encourage initiatives enabling those providing victim support and restorative justice services to receive adequate training to a level appropriate to their contact with victims and observe professional standards to ensure such services are provided in an impartial, respectful and professional manner.

5. In accordance with the duties involved, and the nature and level of contact the practitioner has with victims, training shall aim to enable the practitioner to recognise victims and to treat them in a respectful, professional and non-discriminatory manner.

10.7 Six key elements of this Article should be noted. First, it is concerned with victims in general, but victims of sexual crime should be of particular concern because of their special vulnerability, in many instances at least. Secondly, it is clearly intended to apply to *everyone* who has contact with victims in a professional or therapeutic capacity. This includes police, court officials, judges, lawyers and persons who

provide victim support or restorative justice services. Thirdly, it is respectful of the independence and professionalism of judges and lawyers. States are not being asked to compel such persons to undergo training. Rather, in the case of judges, the State should encourage those who provide judicial education to provide appropriate training for dealing with crime victims. Likewise, the State must recommend to those responsible for the training of lawyers to include appropriate victim-related training. Fourthly it extends to persons providing victim support or restorative justice services. Such services are often provided by voluntary bodies in addition to or instead of state agencies. In either event, the State should ensure, as far as possible, that all providers of these services including, one assumes, volunteers, are provided with appropriate training and that they are encouraged to avail themselves of it. Fifthly and in connection with the first point, Article 25 refers repeatedly to "general and specialist training" thereby recognising that the nature and extent of the required training may vary, depending on the category of victim involved. Finally, the qualities which are demanded of professionals and others dealing with victims are impartiality, respect and professionalism.

10.8 Essentially, the kind of training we recommend involves education, familiarisation and consciousness-raising in respect of a number of key matters including (1) the special needs of witnesses who are vulnerable by virtue of youth or disability, including the optimal manner of questioning such witnesses; (2) the experiences of victims of sexual crime more generally, including awareness of how the trauma and stress occasioned by the crime may shape or influence the victim's response in terms of reporting it (including the time at which they report it) and participating in later stages of the process; (3) rape myths and erroneous assumptions about the true nature of sexual crime and the different ways in which individual victims may respond to it. A training programme of the kind we recommend should equip all relevant practitioners with an understanding of these matters and with the skills to deal with all vulnerable witnesses effectively, helpfully and respectfully.

## Judicial studies

10.9 At present several judicial conferences are held annually. There is generally one for District Court judges, one for Circuit Court judges and one for superior court judges. These generally last for 1½ to 2 days. In addition, there is an annual one-day conference attended by all judges. These conferences provide an opportunity for judges to discuss issues arising within their various jurisdictions and to receive presentations from relevant experts on recent developments and emerging areas of law. Judicial education and training has now been placed on a statutory footing under the Judicial Council Act 2019. Section 17 of the Act requires the Judicial Council to establish a Judicial Studies Committee the primary function of which is "to facilitate the continuing education and training of judges with regard to their functions." Section 17(3) includes a non-exhaustive list of matters on which such education and training may be offered, namely:

(1) Dealing with persons in respect of whom it is alleged an offence has been committed;
(2) The conduct of trials by jury in criminal proceedings;
(3) European Union law and international law;
(4) Human rights and equality law;
(5) Information technology; and
(6) The assessment of damages in respect of personal injuries.

Clearly, therefore, the Oireachtas intended that dealing with victims in criminal cases, as well as the conduct of trials, should be included in judicial studies programmes.

10.10 This Working Group therefore requests that the Judicial Studies Committee be asked to give high priority to the first topic listed in s. 17(3) of the 2019 Act, and with a special emphasis on sexual offences. An inter-disciplinary approach is needed, and it would be valuable to have input from judges and lawyers in other jurisdictions which already have well-established training programmes in this area. Other professionals including counsellors and Probation Officers can also provide valuable insights into the difficulties encountered by vulnerable witnesses before and during criminal trials. Judicial education should also include familiarisation with the function of intermediaries and the contribution they can make to the trial process.

## Training for lawyers

10.11 Practising members of both branches of the legal profession are subject to continuing professional development (CPD) requirements. The framework of the CPD system for solicitors is set out in a statutory instrument (Solicitors (Continuing Professional Development) Regulations 2017) and the requirements are specified in detail in the Law Society's *Continuing Professional Development Scheme,* which is published annually. CPD is defined by the Society as "further education or training (or both) to be undertaken by a solicitor, whether relating to law or to management and professional development skills or to regulatory matters, intended to develop the solicitor in his or her professional knowledge, skills and abilities…" The requirements apply to all solicitors holding practising certificates from the Law Society and solicitors in the full-time service of the State. Such a solicitor must fulfil 20 CPD hours (including some minimum requirements in relation to management and professional development skills and regulatory matters) in each practice year.

10.12 In relation to practising barristers, the Bar of Ireland has had a CPD system since 2005. The Council defines CPD as "the systematic maintenance, improvement and broadening of knowledge and skill and the development of personal qualities necessary for the performance of professional duties throughout the barrister's working life" (www.lawlibrary.ie, under "CPD Responsibilities"). Barristers are required to accumulate 12 CPD points for each practice year, and these may be obtained by engaging in activities such as attending conferences, courses and seminars, teaching, training, chairing and research and writing. Compliance is essentially by way of self-certification, though subject to monitoring.

10.13 The CPD schemes for solicitors and barristers make no reference to specialist training for lawyers dealing with vulnerable witnesses generally or in the specific context of sexual offence trials. The Working Group is therefore of the view that provision must now be made to ensure that every lawyer who may be involved in a sexual offence trial has adequate specialist training.

10.14 Article 25 of the EU Victims Directive, acknowledging the independence of prosecutors as well as judges, provides that Member States shall request those responsible for the training of judges and prosecutors to include training which will increase their awareness of the needs of victims. We accept that the Director of Public Prosecutions in this jurisdiction provides training for her professional staff, including lawyers. We welcome this, but recommend that steps should be taken, as outlined below, to ensure that every lawyer acting on behalf of the prosecution (as well as for the defence) in any sexual offence case should have training of the kind recommended.

## Training for lawyers who deal with vulnerable witnesses

10.15 The Working Group recommends that all solicitors and barristers whose work involves interaction with victims of sexual crime should receive special training. It is clearly not necessary that all legal practitioners should receive such training, as many will not be engaged in criminal law practice. At a minimum, it is desirable that all practising lawyers dealing with sexual offence cases should undergo a foundational course of training and that all should have completed it by a date to be agreed with the two professional bodies – the Law Society and the Bar Council. We recommend that the completion date should be not later than the beginning of the legal year 2021-2022, but preferably sooner. It is further recommended that each such practitioner should be required to earn a certain number of CPD points in that specific area on a regular basis, say every two years. The foundational course should require attendance at a prescribed number of seminars delivered by appropriate specialists. The subject matter of these seminars should include dealing with vulnerable witnesses in court (with a special emphasis on the questioning of such witnesses), obtaining the best evidence from vulnerable witnesses and the dangers associated with stereotyping of victims of sexual crime. As in the case of judicial studies, it is strongly recommended that some at least of the seminars on this foundational course should be delivered by counsellors, probation officers and also by professionals from other jurisdictions that already have well-established training systems of this kind.

## Implementation of training requirement

10.16 It is essential that specialist training for lawyers dealing with sexual offence cases should be well structured, effective and adequately monitored. The governing bodies of both legal professions take continuing professional development seriously, and we

hope that they will accept the need for the kind of specialist training that we recommend here. The clear objective must be to ensure that, before long, all solicitors and barristers appearing for the defence or prosecution in sexual offence cases will have undergone the recommended training. The same would apply to lawyers appearing in such cases in any other capacity, including a barrister instructed by the Legal Aid Board to represent a victim under the s. 4A of the Criminal Law (Rape) Act 1981, as inserted by the Sex Offenders Act 2001, s. 34. Various implementation strategies are possible but, in light of the well-established CPD systems operating within both professions, we recommend that, initially at least, the Law Society and the Bar Council should assume responsibility for monitoring the implementation of the training requirement. They could do this by adapting their existing CPD monitoring arrangements to include a requirement that "relevant practitioners" provide evidence that they have undergone the initial training and have engaged in any ongoing training as required by the scheme which is finally adopted. A "relevant practitioner" for this purpose would be a solicitor or barrister whose professional work involves dealing with victims of sexual crime (and this, of course, would predominantly be as a prosecutor or defence lawyer). The Director of Public Prosecutions, the Minister for Justice and Equality (as the Minister currently responsible for the operation of the Criminal Legal Aid Scheme) and the Legal Aid Board would be entitled to seek from each of the professional bodies a list of their members who have undergone the prescribed training.

## Training for others who deal with vulnerable witnesses

10.17 As the terms of Article 25 of the EU Victims' Rights Directive make clear, persons other than judges and lawyers who deal with crime victims must also be appropriately trained. Training for law enforcement personnel is especially important. The police will usually be the first officials with whom a victim comes into contact. This has already been addressed in Chapter 3 above. Steps should also be taken, as far as practicable, to ensure that all those who provide counselling and support for victims of sexual crime have appropriate training. As already noted, many such persons may be acting in a voluntary capacity or as employees of a voluntary organisation. The responsibility for ensuring that all those providing counselling or support for victims of sexual crime are adequately trained rests primarily with the organisation itself. The relevant government department bears this responsibility in respect of persons employed in the public sector who are providing counselling, support, medical or other assistance of this nature. Private and voluntary organisations should, however, be subject to state inspection to ensure that all their staff are adequately qualified and trained.

## Appointment of implementation committee

10.18 The creation and delivery of an effective training programme for lawyers will require a good deal of thought and planning, with input from a variety of specialisms. We recommend that the Minister for Justice and Equality should appoint a planning and

implementation committee with representatives from both legal professions as well as specialists in areas such as psychology, psychiatry and probation/social work to develop a training programme specially designed for legal practitioners who deal with victims and other vulnerable witnesses in sexual offence cases. We recommend that this be done as soon as possible so that the training programme that is thereby devised can be delivered to practitioners on a countrywide basis, preferably over the next year or so. Finally, we stress that what we are recommending here are minimum training requirements. We strongly encourage the legal professions and other relevant organisations to go further and take the initiative in providing additional training opportunities for their members, employees and volunteers on an ongoing basis.

## SUMMARY OF RECOMMENDATIONS

- **All judges presiding over criminal trials for sexual offences and all lawyers appearing in such trials should have specialist training which equips them with an understanding of the experience of victims of sexual crime. They should also have training in connection with the questioning of witnesses who are especially vulnerable by virtue of youth or disability.**

- **It is recommended that the Judicial Studies Committee, established by the Judicial Council Act 2019, should consider providing such training for judges.**

- **The Law Society of Ireland and the Bar Council should take steps as soon as possible to provide specialist training for solicitors and barristers, respectively, who deal in any professional capacity with victims of sexual crime. This training can be delivered within existing CPD frameworks unless the professional bodies in question decide that such training can be more effectively provided by other means.**

- **The Director of Public Prosecutions, the Minister for Justice and Equality, the Legal Aid Board and any other public authority responsible for briefing professional lawyers in sexual offence trials should be entitled to receive, upon request, from the Law Society and the Bar Council a list of solicitors and barristers, respectively, who have satisfactorily completed the prescribed course of specialist training.**

- **Steps should be taken to ensure that all personnel in State Agencies who are likely to have to deal with victims of sexual crime should have appropriate training.**

- **The Minister for Justice and Equality should appoint a planning and implementation committee, with an appropriate range of expertise, to devise and develop a specialist training programme for legal professionals who deal with victims and other vulnerable witnesses in sexual offence cases.**

- **Measures, including an inspection system, should be put in place to ensure that all those who provide counselling, therapy and related services to victims of sexual crime have appropriate training. This should also apply to everyone, including legal practitioners and other professionals, involved in restorative justice programmes related to sexual offending.**

# Appendix 1: Terms of Reference

(1) To review the adequacy of the mechanisms available in law and practice relating to the protection of vulnerable witnesses during the investigation and prosecution of sexual offences, including in particular:

- access to specialist training for An Garda Síochána, members of the judiciary and legal professionals dealing with sexual offences;
    - practical supports for vulnerable witnesses through the reporting, investigation and trial processes;
- provision of additional legal supports to witnesses during the court processes;
    - measures in place to protect vulnerable witnesses during evidence, including the use of measures such as pre-recorded evidence or video-link;
    - the causes of delay in sexual offence trials, and the effect of delay upon vulnerable witnesses;
    - the use of preliminary trial hearings to determine evidential issues including conflicts of evidence and sexual experience evidence;
    - provision for restrictions on public attendance at, and media reporting on, trials of sexual offences, and;
- such other relevant issues that may arise during the course of the review process.

(2) The review group shall, in particular, have regard to the recommendations of the publication by the Rape Crisis Network Ireland entitled 'Hearing Every Voice – Towards a New Strategy on Vulnerable Witnesses in Legal Proceedings.'

The review group shall make recommendations to the Minister for Justice and Equality no later than 31 December 2018 or at the earliest date thereafter. The Minister will be provided with an interim report after 3 months.

# Appendix 2: Consultations

- On 13th November 2018, the group met with representatives of the legal profession.

- On 27th November 2018, the group met with a number of organisations representing victims of sexual offences (Crime Victims Helpline, One in Four, CARI, Dublin Rape Crisis Centre, Rape Crisis Network, National Women's Council of Ireland and Women's Aid).

- On 10th December 2018, the group met with Sir John Gillen, who carried out a similar review in Northern Ireland, and members of his team.

- On 21st January 2019, the group met with representatives from the Legal Aid Board.

- On 26 February 2019 a visit to the Garda special interview suite.

- On 28 June 2019 the Group had a conference call with Department of Justice Northern Ireland – Victims and Witnesses Branch Safer Communities Directorate

# Appendix 3: List of Organisations and Individuals who made a Submission to the Review

Anna Morvern – Survivors With Biros
Bar Council of Ireland
'Count Me In! campaign' (Survivors of Sexual Abuse Standing Together for Change) – 105 anonymous contributors
Derek Habington
Dublin Rape Crisis Centre
George Tobin
Susan Dillon - I Believe Her
Jane Ross
Joan Redmond
Joyce Kavanagh
June Kavanagh
Legal Aid Board
Mens Voices Ireland
One in Four
Paula Kavanagh
Rape Crisis Network Ireland
Ruth Balbirnie
Shaneda Daly
Temple Street and Our Lady's Children's Hospital
Women's Aid

# Appendix 4: Complete list of recommendations

## Chapter 2: General recommendations

- Steps should be taken to increase public awareness of the terms of the Criminal Justice (Victims of Crime) Act 2017.
- There should be a government-sponsored programme of public education on the meaning and importance of consent in the context of sexual relationships and sexual activity.
- In order to promote a victim-centred approach to the provision of services, there should be greater inter-agency communication to ensure that all state agencies, voluntary organisations and non-governmental organisations dealing with vulnerable victims are fully aware of the services provided by others.
- The facilities for victims and other vulnerable witnesses should be of a consistent standard throughout the country.

## Chapter 3: Investigation and prosecution of sexual offences

- All serving members of An Garda Síochána engaged in front line policing should be trained in the principles and practices to be followed when engaging with victims of sexual crime, and with other witnesses (including suspects) who may be vulnerable by virtue of age, disability or some other factor.
- The specialist training provided for those members of An Garda Síochána assigned to interview victims and other vulnerable witnesses, as well as the training provided for Garda recruits, should be regularly monitored by external experts to ensure that it is of the requisite standard and that it conforms with best international practice.
- Urgent steps should be taken to ensure that there is a complete roll out of Divisional Protective Services Units as soon as possible.
- An Garda Síochána should keep under review the number and geographical spread of special interview suites throughout the State in order to ensure that all vulnerable victims have reasonably convenient access to such a suite.
- The operation of the specialist interview suites should be periodically evaluated by an external expert who would seek the views of victims who had been interviewed within them, relevant members of An Garda Síochána and others.
- We recommend that the additional funding promised to the Office of the Director of Public Prosecutions to establish and maintain the new Sexual Offences Unit be delivered commensurate with the requirements.

## Chapter 4: Anonymity, public attendance and media reporting of sexual offense trials

- Victims in all trials for sexual assault offences should remain entitled to anonymity, irrespective of the outcome of the trial.

- Introduce legislation to extend anonymity to victims in trials for offences contrary to ss. 21 and 22 of the Criminal Law (Sexual Offences) Act 2017. These sections deal with sexual abuse of persons with mental illness or a mental or intellectual disability.
- Accused persons in all trials for sexual assault offences, and not just in trials for rape offences as at present, should be entitled to anonymity unless convicted. If convicted, they may be identified unless to do that would lead to the identification of the victim.
- Persons accused of any offence contrary to ss. 3 to 8 of the Criminal Law (Sexual Offences) Act 2017 (which outlaw various forms of child sexual exploitation) should be entitled to anonymity on the same basis as now applies to an accused on trial for a rape offence.
- The definitions of "published" and "broadcast" in the Criminal Law (Rape) Act 1981 should be reviewed to ensure that they are sufficiently comprehensive to cover publication in electronic media, including social media.
- Express statutory provision (in terms similar to those currently contained in s.6 of the Criminal Law (Rape) Act 1981) should be made for the exclusion of the public from the trials of other sexual offences that are not covered by existing legislation, where a victim may be called upon to give evidence or where there is a risk that the victim's identity might be publicly revealed.
- Those provisions in, for example, s. 6(4) of the Criminal Law (Rape) Act 1981 and s. 29(2) of the Criminal Law (Sexual Offences) Act 2017 which require that, even where a trial is held otherwise than in public, the verdict and sentence (if any) must be announced in public should be repealed.

## Chapter 5: Preliminary trial hearings

- Legislation should be introduced, along the lines proposed in the General Scheme for a Criminal Procedure Bill drawn up in 2015 by the Department of Justice and Equality, to provide for the establishment of preliminary trial hearings. We recommend the introduction of the necessary legislation as soon as possible.
- Without prejudice to the other matters that may be addressed at a preliminary hearing, any defence application to be made at trial to question a victim about his or her sexual experience under the terms of s. 3 of the Criminal Law (Rape) Act 1981 should be notified to the Court at that hearing, and the Legal Aid Board notified accordingly.
- Any issues relating to the appointment or role of an intermediary, and any other special measures required for vulnerable witnesses, should also be addressed at a preliminary trial hearing.
- There should be an obligation on both prosecution and defence to notify the judge conducting the preliminary trial hearing of any outstanding matters relating, for example, to disclosure that may prevent the trial from commencing on the scheduled date.
- Lawyers in private practice representing either the prosecution or the defence should be duly remunerated for their work in preparing for and attending preliminary trial hearings.

## Chapter 6: The trial of sexual offences

- Section 3 of the Criminal Law (Rape) Act 1981, as amended, which governs the questioning of victims at sexual offence trials, should be retained in its present form, but there should be an additional provision allowing the barrister who is briefed to represent the victim when an application is being made to engage in such questioning to continue to represent the victim while the questioning, if permitted by the trial judge, is taking place.
- The right to separate legal representation for victims under section 4A of the Criminal Law (Rape) Act 1981 (in circumstances where an application is made to question a victim about other sexual experience) should be extended to include trials for sexual assault.
- Appropriate steps should be taken to ensure that judges and lawyers are familiar with section 21 of the Criminal Justice (Victims of Crime) Act 2017, especially as it relates to the questioning of victims during sexual offence trials.
- Where the defence intends to apply to the trial judge for leave to question a victim about other sexual experience under the terms of s. 3 of the Criminal Law (Rape) Act 1981, it should be required to notify the judge conducting the preliminary trial hearing of that intention. It is only in exceptional circumstance that such an application should be permitted at trial unless it has been notified at the preliminary trial hearing.
- Once notification has been given at a preliminary trial hearing of intention to apply for leave to question a victim at trial under the terms of section 3 of the Criminal Law (Rape) Act 1981, the Legal Aid Board should be immediately informed. The Legal Aid Board, in turn, should endeavour to ensure that the victim is represented by counsel of a level of seniority similar to that of counsel representing the prosecution and defence.
- Effective steps should be taken to bring the existence of section 19A of the Criminal Evidence Act 1992 regarding the disclosure of counselling records to the attention of victims and any persons who are advising them. It is important that victims should be aware of their right to object to the disclosure of such records.
- Further consideration should be given to the question of whether the disclosure of medical records should be made subject to a statutory regime similar to that applicable to the disclosure of counselling records.
- A positive obligation should be imposed, by statute if necessary, on all statutory or public bodies, voluntary bodies and independent counsellors holding counselling records to furnish those records promptly to the Director of Public Prosecutions once requested to do so.
- A formal code of practice should be established to govern the collection and disclosure of a victim's digital material and electronic data such as text messages, social media and internet usage. There should be a periodic evaluation of the process and, as part of that, feedback should be sought from victims as to their experience of this aspect of the criminal investigation.

## Chapter 7: Information for victims

- The Department of Justice and Equality or an appropriate state agency should establish a website, the existence of which would regularly be brought to public attention, containing comprehensive information for victims of sexual crime. This information should be presented in a clear and accessible manner and deal with matters such as the reporting of sexual offences, the trial process, the availability of legal advice, and the availability of counselling, therapeutic and other assistance for victims.
- An Garda Síochána should develop a Garda ACTIVE Mobility App that will advise Garda members of the information they should be providing to victims in accordance with the Criminal Justice (Victims of Crime) Act 2017. The App should also, where possible, be capable of sharing to a mobile device, an email address or other information telecommunications app, an electronic version of the Victim Information Card and Victim Information Booklet in a language understood by the victim.
- Section 26(3A) of the Civil Legal Aid Act 1995 should be amended to provide that the Legal Aid Board may provide free legal advice to victims of sexual offences (and not just in cases where a prosecution is being taken).
- The range of offences to which section 26(3A) of the Civil Legal Aid Act 1995 applies should be extended to include sexual assault and the offences created by sections 3 to 8 of the Criminal Law (Sexual Offence) Act 2017 (which outlaw various forms of child sexual exploitation), section 18 (which relates to a sexual act by a person in authority with a young person aged between 17 and 18 years) and sections 21 and 22 (which relate to the sexual abuse of persons with mental illness or a mental or intellectual disability).
- Section 26(3A) Civil Legal Aid Act 1995 should further be amended to provide legal advice, in appropriate circumstances, to a parent, guardian or other responsible adult where the victim is a child or a person with a mental illness or intellectual disability. This would not apply where the parent or other responsible adult is the suspected or alleged offender.
- A court familiarisation service should be available to every victim who is due to appear as a witness in criminal proceedings. We recommend that the present witness familiarisation programme operated by the Director of Public Prosecutions and An Garda Síochána should continue and, further, that it should be available to all victims of sexual crime throughout the country. We further recommend that a similar service be available to victims in District Courts outside Dublin where generally An Garda Síochána will have carriage of the prosecution.
- Victims of a sexual offence should be entitled to have some personal support during criminal proceedings relating to the offence. We strongly commend the support now operated on a voluntary basis in the Criminal Courts of Justice in Dublin and in some other court venues, but we recommend that steps be taken to ensure that such a service, or an equivalent service of equal standard, is available to all victims of sexual crime throughout the country.

## Chapter 8: Intermediaries

- A cohort of appropriately qualified intermediaries who have undergone a prescribed course of training on the role of intermediaries should be recruited and placed on a register. All intermediaries should have a professional background in speech and language therapy, social work, clinical psychology, occupational therapy or some cognate area.
- The task of recruiting and training intermediaries should be undertaken by the Department of Justice and Equality or an appropriate state agency. With well-established systems of intermediaries now operating in our neighbouring jurisdictions, it should be possible to draw upon their experience and expertise in establishing a training programme and assessing persons for their suitability to act as intermediaries.
- An adequate number of intermediaries should be appointed on a full-time basis, the precise number depending on the estimated demand for their services throughout the country.
- Intermediaries, where needed, should be involved from the earliest stages of the criminal process and, in particular, should be available to assist at Garda interviews of victims, defendants or other potential witnesses who may be vulnerable on account of age or physical or mental disability.
- Where at all possible, the same person should serve as intermediary in respect of a particular witness throughout the entire criminal process. An intermediary who has been involved in the Garda interview should continue to function in respect of the witness in question during the trial where one takes place.
- The role of the intermediary should essentially be an advisory one. Having assessed the communication needs of a person being interviewed by An Garda Síochána or about to testify as a witness, as the case may be, the intermediary would advise legal representatives and the court as to the most appropriate way of questioning the witness so as to enable the witness to give their best evidence.
- Intermediaries may nonetheless, on occasion, be called upon to play a more active role at the questioning of a witness as envisaged by s. 14 of the Criminal Evidence Act 1992. We therefore recommend that this section be retained.
- An administrative structure should be put in place to maintain a register of qualified intermediaries, to arrange for the recruitment of additional ones where needed, and to arrange for the assignment of intermediaries, as required and on a case-by-case basis, for Garda interviews and criminal trials.
- In the event that it proves difficult to recruit a sufficient number of appropriately qualified intermediaries within this jurisdiction, consideration should be given to entering into discussion with the relevant Northern Ireland authorities with a view to having a joint register of intermediaries. However, everyone acting as an intermediary in this jurisdiction would be required to complete a training course on the criminal process in this jurisdiction and the role of intermediaries within it.

## Chapter 9: Reducing delay

- The Sentencing Guidelines and Information Committee, established under the terms of the Judicial Council Act 2019, should consider giving priority to drawing up a guideline on discounts for guilty pleas and also to sentencing guidelines for sexual offences, especially those offences in respect of which there are no judicially developed guidelines.
- A system of preliminary trial hearings should be established, as already recommended in Chapter 5. The governing legislation should allow, to the greatest extent practicable, for issues that may contribute to delay in the commencement of trials or to the adjournment of trials to be addressed at such hearings.
- Further empirical research should be undertaken on the processing of sexual offence cases from the time at which a complaint is made until the case comes on for trial, in those cases where a prosecution is initiated. The purpose of this research would be to identify any problems that may contribute to delay and any measures that might be adopted to address those problems.
- Any proposal for the appointment or allocation of additional judges to the criminal courts should be preceded by an assessment of the impact which this would have on the court accommodation and facilities that are available, or that would be required, for victims and other persons participating in or attending sexual offence trials.

## Chapter 10: Training

- All judges presiding over criminal trials for sexual offences and all lawyers appearing in such trials should have specialist training which equips them with an understanding of the experience of victims of sexual crime. They should also have training in connection with the questioning of witnesses who are especially vulnerable by virtue of youth or disability.
- It is recommended that the Judicial Studies Committee, established by the Judicial Council Act 2019, should consider providing such training for judges.
- The Law Society of Ireland and the Bar Council should take steps as soon as possible to provide specialist training for solicitors and barristers, respectively, who deal in any professional capacity with victims of sexual crime. This training can be delivered within existing CPD frameworks unless the professional bodies in question decide that such training can be more effectively provided by other means.
- The Director of Public Prosecutions, the Minister for Justice and Equality, the Legal Aid Board and any other public authority responsible for briefing professional lawyers in sexual offence trials should be entitled to receive, upon request, from the Law Society and the Bar Council a list of solicitors and barristers, respectively, who have satisfactorily completed the prescribed course of specialist training.
- Steps should be taken to ensure that all personnel in State Agencies who are likely to have to deal with victims of sexual crime should have appropriate training.
- The Minister for Justice and Equality should appoint a planning and implementation committee, with an appropriate range of expertise, to devise and develop a specialist

training programme for legal professionals who deal with victims and other vulnerable witnesses in sexual offence cases.

- Measures, including an inspection system, should be put in place to ensure that all those who provide counselling, therapy and related services to victims of sexual crime have appropriate training. This should also apply to everyone, including legal practitioners and other professionals, involved in restorative justice programmes related to sexual offending.